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No. (0)

In The

Supreme Court of the United States

October Term, 2005

COUNTY OF VENTURA,

Petitioner,

vs.

NOELLE WAY,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. In the Eleventh Circuit, jail facility personnel may strip search an arrestee solely based upon an arresting charge of weaponless misdemeanor battery, whereas the Ninth Circuit's published opinion in this case forbids jail personnel to conduct a strip search of an arrestee on the basis of being under the influence of an illicit drug; should the Court grant certiorari to resolve this conflict in the circuit courts?

2. Are the Ninth Circuit and Tenth Circuit holdings that drug charges are an insufficient basis to perform a visual strip search compatible with this Court's holding in *Bell v. Wolfish*, which allows jail personnel, without cause, to strip search all pretrial detainees having had contact with third persons?

3. Does the Ninth Circuit's published opinion, which impliedly questioned the validity of California's strip search statute, contravene principles of federalism and separation of powers with respect to the management of county jails and expose such facilities to civil liability?

4. Given this Court's holding in *Schmerber v. California* that a probable cause-based arrest for intoxication permits the state to force an arrestee to have blood drawn, should jail personnel processing a drug-intoxicated suspect, arrested on probable cause, be able to perform a visual-only, same-gender, private strip search?

5. Does the Ninth Circuit's published opinion unreasonably require a county jail manager to demonstrate the existence of some ill-defined track record of disaster as a condition precedent to the adoption of prophylactic policies designed to ensure the safe operation of jail

facilities containing congregations of dangerous individuals in varying and complex processing stages?

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Petitioner, County of Ventura, respectfully requests this Court to issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINION BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit ("Ninth Circuit") dated April 20, 2006, is reported at *Way v. County of Ventura,* 445 F.3d 1157 (9th Cir. 2006). The United States District Court for the Central District of California granted respondent's summary judgment motion, finding that county jail personnel's visual-only unclothed body cavity examination policy, under which new arrestees charged with offenses relating to drugs, weapons, or violence, were strip searched, violated the United States Constitution.

BASIS FOR JURISDICTION IN THIS COURT

The order denying the petition for rehearing and suggestion for rehearing en banc by the Ninth Circuit was entered on May 31, 2006.

The statutory provision conferring upon this Court jurisdiction to review on a writ of certiorari the judgment and order in question is 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

In accordance with Supreme Court Rule 14(f), petitioner sets forth the constitutional provision and statutes, in relevant part, involved in this case:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . .

U.S. Const., amend. IV.

The statute at issue provides, in relevant part, as follows:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law . . . .

42 U.S.C. § 1983.

The state statute at issue provides, in relevant part, as follows:

> No person arrested and held in custody on a misdemeanor or infraction offense, except those involving weapons, controlled substances or violence . . . shall be subjected to a strip search or visual body cavity search . . . .

Cal. Penal Code § 4030(f).

STATEMENT OF THE CASE

Respondent filed her lawsuit alleging constitutional and state-law violations in the United States District Court for Central District of California. She sued an arresting officer from a local city police department for false arrest. She also sued the county jail for conducting a "strip search" of her not long after her arrival at the facility.

The county jail modeled its search policy on the state Penal Code and three Ninth Circuit decisions concerning the subject. Each authorized a county jail or pretrial detention facility to conduct a limited strip search of recent arrestees being booked for offenses relating to drugs, weapons, or violence. The provisions of law upon which petitioner's search policy was modeled were *Giles v. Ackerman*, 746 F.2d 614, 618 (9th Cir. 1984); *Kennedy v. Los Angeles Police Department*, 901 F.2d 702, 716 (9th Cir. 1990); *Fuller v. M.G. Jewelry*, 950 F.2d 1437, 1447 (9th Cir. 1991); and California Penal Code Section 4030(f).

The parties in the district court agreed upon virtually all of the facts. The strip search was based upon respondent's arrest on charges of being under the influence of a controlled substance in violation of California Health and Safety Code Section 11550. She was transported by the arresting officer to the local hospital, where a blood sample was obtained.

The officer then transported respondent to the county jail, a fresh-intake facility for all arrestees in the county. Not long after respondent's arrival, she was subjected to a limited strip search after the female custody deputy, Karen Hanson, obtained her supervisor's written approval.

The basis of the search was exclusively the nature of the charges relating to recent use of a controlled substance. The arresting officer supplied the custody deputy with a declaration averring that there was probable cause to believe that respondent was under the influence of a controlled substance in violation of the stated Health and Safety Code section.

The parties also agreed that the search was limited in a number of facets. The search was performed by a custody deputy of the same gender as respondent. The only other person present in the room with respondent during the search was the female custody deputy. The search took place in a closed room with no one else able to view the process.

The search was visual only — no touching occurred. The deputy instructed respondent to remove each article of clothing, searched it for the presence of contraband, instructed respondent to run her fingers through her hair and mouth, and then directed her to bend and expose body cavities to visual inspection.

While respondent declined to stipulate to the length of the search, it was submitted separately as a fact in the district court by petitioner. Respondent did not oppose the submission. The customary process lasts between a couple of minutes and seven or eight minutes, depending upon the arrestee's degree of sobriety, quantity of clothing, and whether any objects are actually found. The bending and spreading part of the search is brief, no longer than it takes to perform the visual examination of the body cavities. It lasts between 15 and 30 seconds, after which the arrestee is immediately instructed to dress.

On cross-motions for summary judgment, the district court granted respondent's motion and ruled that the strip search policy violated the federal Constitution although it did not violate state law. After the district court's ruling, respondent's counsel filed a separate class action against petitioner in *Gamino v. County of Ventura, et al.*, case number CV 02-9785 CBM (Ex). The district court certified the class as comprised of approximately 4,800 plaintiffs.

Following the class action filing, petitioner placed a moratorium upon its search policy. During that discontinuity, a number of serious events occurred in the county jail from arrestees having concealed drugs and drug paraphernalia. Information provided by an inmate indicated that suspects and arrestees knew that jail staff was no longer searching arrestees. As a result, contraband drugs and paraphernalia began to freely enter the jail in body cavities.

One inmate suffered the embedding of a hypodermic syringe in her rectum. Another inmate smuggled a cigarette lighter and narcotics in a body cavity, and while lighting the contraband in her cell, she set it on fire. Another inmate who was in continuous custody for several hours suddenly went into a comatose stupor. Blood work obtained thereafter indicated the presence of huge quantities of methamphetamine but small quantities of its metabolite, amphetamine, suggesting recent ingestion.

Petitioner pursued an interlocutory appeal. The Ninth Circuit published an opinion dismissing the appeal without prejudice because the issue of qualified immunity of the individual defendants had not yet been resolved.

On remand, the individual defendants moved for summary judgment on the ground of lack of clearly established law. The district court denied the motion and entered judgment against them.

Petitioner and the individual defendants then perfected a second interlocutory appeal, resulting in the published opinion in this case. The panel unanimously ruled that the search policy violated the Fourth Amendment and engaged § 1983 liability.

The opinion states that the court need not comment on whether any other type of drug offense might allow a visual strip search and that the court need not address the issue of whether placement in the so-called general jail population might justify such a search. The court also declined to address what quantity of evidence, if any, might demonstrate a sufficient track record of disaster to adopt preventive measures. The opinion does not state that individualized suspicion is the only basis for performing such a search but does not set forth any criteria which would guide local jail officials in fashioning a constitutional policy. The opinion approaches requiring, if it does not actually require, the demonstration of individualized probable cause to believe that a specific new arrestee is concealing drugs or drug paraphernalia as a condition precedent to the search.

The Ninth Circuit agreed that the search policy was unconstitutional but also found that the district court had erred in finding the individual defendants unprotected by qualified immunity. The judges disagreed, however, on the rationale for qualified immunity.

The two-judge majority found qualified immunity mandated by prior circuit pronouncements stating that charges relating to drug offenses were a sufficient predicate,

in and of themselves, to justify a limited strip search. The majority held that those pronouncements were dicta, as they were unnecessary to decide the facts in the prior same-circuit decisions, but did provide the individual defendants with a rational search basis.

The concurring judge agreed that qualified immunity was required. In her view, however, the genesis of the lack of clarity in the law stemmed from the state Penal Code statute. She wrote separately to state that the search practice was probably justifiable under state law, which — until now — had not fallen into "desuetude."

Petitioner and the individual defendants had argued that the state statute provided a source of constitutionality; therefore, the concurring judge's opinion, and, inferentially, the majority opinion, struck down the constitutionality of the state strip search statute. The panel ruled that while the policy conformed to the state statute, it was, nevertheless, unconstitutional.

Petitioner sought rehearing and rehearing en banc. The Ninth Circuit denied the petition without dissent.

REASONS FOR GRANTING THE WRIT

I.

A UNITED STATES COURT OF APPEALS HAS PUBLISHED A DECISION IN CONFLICT WITH THE DECISION OF ANOTHER UNITED STATES COURT OF APPEALS ON THE SAME IMPORTANT ISSUE.

In the Eleventh Circuit, an arrestee may be strip searched for misdemeanor domestic violence with no indication of a weapon being involved. *Hicks v. Moore*, 422 F.3d 1246 (11th Cir. 2005). The plaintiff, Janet Hicks,

was arrested by a sheriff's deputy following a domestic dispute with her estranged husband. Although she exhibited no violent behavior after the deputy arrived, he determined that she was the chief aggressor and charged her with family violence battery.

The deputy took her to the county jail, where he notified the jailers of the arrest charge upon transferring her for processing. No jailer who had contact with the plaintiff during the booking process suspected that she was concealing weapons or drugs.

A female employed by the sheriff's department took plaintiff from her cell. She took her into a bathroom, where the strip search was performed. No one else was in the room. The search was visual and not tactile. The search lasted about five or six minutes.

The search was actually performed because the jail's policy was simply to strip search everyone who came into the facility, regardless of the charge. The *Hicks* court indicated that although it would have approved such a policy as constitutional, it was bound by prior circuit precedent to decide the case on narrower grounds.

The majority in *Bell v. Wolfish*, 441 U.S. 520, 559 (1979), recognized the uniqueness of a pretrial detention facility's security concerns by dispensing with *any* informational level for searches of this nature. An arrestee is fresh from contact with the outside world and is therefore analogous to a housed inmate fresh from a contact visit. The truest rendering of *Bell*'s holding is the suggestion of the Eleventh Circuit that a county jail may visually strip search all new arrestees regardless of whether reasonable suspicion exists for the search of a particular pretrial detainee. *Hicks v. Moore*, 422 F.3d at 1248.

Constrained by its own circuit precedent, the *Hicks* court resolved the issue by characterizing the arresting offense as one of violence. Of family violence battery, the *Hicks* court observed: "This crime is obviously one of violence." *Id.* at 1252.

Accepting that a person being charged with a crime of violence was sufficient to evoke reasonable suspicion that the person might be concealing weapons or other contraband, the *Hicks* court determined that it was objectively reasonable to conduct a strip search on the basis of the charge alone. This was so even though the arresting officer and jail shift supervisor testified that based upon their interactions with the plaintiff, they never subjectively suspected her of possessing drugs or weapons.

There has been a strong predisposition in the circuits over the last two decades to equate the probable cause to arrest for charges relating to drugs, violence, or weapons with the lower informational level of reasonable suspicion sufficient to allow a brief, same-gender, closed-door, visual body cavity examination. Examples include:

Watt v. City of Richardson, 849 F.2d 195, 197-198 (5th Cir. 1988) ["Watt does not challenge the propriety of strip searches conducted prior to incarceration on charges of narcotics, shoplifting or weapons violations. Such a challenge would be fruitless. . . . Reasonableness under the fourth amendment must afford police the right to strip search arrestees whose offenses posed the very threat of violence by weapons or contraband drugs that they must curtail in prisons."];

Dufrin v. Spreen, 712 F.2d 1084, 1088-1089 (6th Cir. 1983) ["*Bell v. Wolfish* provides adequate guidance in cases such as this, and it leads clearly to our conclusion that the conduct here fully comports with the requirements of due

process. . . . It is enough here that (a) the arrestee was formally charged with a felony involving violence, (b) that her detention was under circumstances which would subject her potentially to mingle with the jail population as a whole, and (c) that the search actually conducted was visual only, and was carried out discreetly and in privacy."];

Kraushaar v. Flanigan, 45 F.3d 1040, 1046 (7th Cir. 1995) ["Where an arrestee is wearing blue jeans or another heavy material, even the most thorough pat-down search will not necessarily turn up small items such as several hits of LSD on postage stamps, a small rock of crack cocaine, or a razor blade. Accordingly, it is not unreasonable to conduct a limited strip search, as Davis performed on Kraushaar, when an officer is trying to recover suspected contraband."].

Even in the Ninth Circuit, operating a vehicle with license plates reported stolen is a sufficient predicate for conducting a visual strip search. *Thompson v. City of Los Angeles*, 885 F.2d 1439, 1441, 1447 (9th Cir. 1989). On the other hand, the opinion below and opinions from the Tenth Circuit hold that individualized suspicion is required, that categories of offenses cannot, alone, provide the requisite reasonable suspicion for a visual-only strip search, and that arrests by city police for being under the influence of a controlled substance cannot form the basis for a county jail's conduct of a visual-only strip search of a recent arrestee. *Cottrell v. Kaysville City*, 994 F.2d 730 (10th Cir. 1993), and *Foote v. Spiegel*, 118 F.3d 1416 (10th Cir. 1997).

Uncertainty pervades the propriety of this search practice in both federal and state jurisdictions. A person recently arrested in the Eleventh Circuit for slapping a spouse, which says little, if anything, about concealing contraband or weapons, may be freely strip searched

without violating the arrestee's constitutional rights. Yet a person just arrested for being under the influence of illegal drugs, and demonstrating a mentally altered state cannot be strip searched in the Ninth Circuit. Such a search, whether for domestic battery or being under the influence of drugs, was justified under California law before the opinion below effectively declared the statute unconstitutional.

II.

THE NINTH CIRCUIT COURT OF APPEALS HAS DECIDED AN IMPORTANT FEDERAL QUESTION WHICH CONFLICTS WITH RELEVANT DECISIONS OF THIS COURT.

Bell v. Wolfish, this Court's pronouncement upon limited strip searches in the pretrial detention facility context, held that all inmates who had contact visits could be subjected to the limited strip search of the type involved in this case absent any individualized suspicion. In *Schmerber v. California*, 384 U.S. 757 (1966), probable cause to arrest for driving under the influence of alcohol was held sufficient to compel a blood draw from a driver.

Petitioner asserts that being under the influence of a mind-altering substance says as much, if not a great deal more than a contact visit, about the lengths to which an arrestee will go to hide paraphernalia and drugs. That chronic drug users suffer withdrawal symptoms is common knowledge. That such persons will do almost anything to avoid the chilling effects of withdrawal is beyond dispute.

Withdrawal avoidance is not the only reason to conceal drugs and paraphernalia in body cavities. In California, as in many jurisdictions, merely being under the influence of an illicit drug is a misdemeanor often erasable from a conviction record. On the other hand, drug

possession may be a felony. Upon realizing that an encounter with the law is imminent, only a fool would fail to quickly secrete the narcotics or paraphernalia in the most readily accessible and least detectible locations.

Many addicts earn their drugs from suppliers by acting as couriers. If a courier is caught en route to a sale, emerging from incarceration without the product can lead to serious retributive consequences by the supplier. While hiding objects in body cavities is not sane practice, fear of brutal retribution is the mother of invention.

It is also valuable, in the confines of an incarceration facility, to have something of value to trade. Physical safety and favors can be purchased with drugs and drug paraphernalia.

Incarceration is not a random, unforeseeable occurrence. Remands are court ordered to begin serving their sentence on a date certain. Individuals with deep physiological addictions enmeshed in the criminal milieu are frequent targets of law enforcement activity and readily anticipate being picked up for drug-related offenses.

The Ninth Circuit opinion has removed one of the critical tools to ensure the safety of custody personnel and inmates. There is an irreducible minimum of time in which a wide variety of processing steps must be accomplished even before bail can be offered.

The arrestee's name and identification information must be obtained. Fingerprinting must be accomplished both by ink and electronically. The individual must be "run" in the NCIC computer for existing warrants and parole holds. Booking photographs must be taken. A health screening questionnaire to ascertain the arrestee's health needs must be completed. The custody deputy must

read the probable cause declaration for the necessary data. Telephone calls must be allowed — many jurisdictions permit three calls.

The amount of the bail must be ascertained — if the offense is bailable. Sometimes certain offenses, based upon degree of severity, require a judge's determination of whether bail is even allowable and, if so, the amount thereof. Violent or uncooperative inmates on the booking floor demand immediate attention. Classification personnel determine housing assignments.

These considerations demonstrate what this Court said so many years ago is uncannily accurate:

> A detention facility is a unique place fraught with serious security dangers. Smuggling of money, drugs, weapons, and other contraband is all too common an occurrence. And inmate attempts to secrete these items into the facility by concealing them in body cavities are documented in this record . . . . That there has been only one instance where an MCC inmate was discovered attempting to smuggle contraband into the institution on his person may be more a testament to the effectiveness of this search technique as a deterrent than to any lack of interest on the part of the inmates to secrete and import such items when the opportunity arises.

Bell v. Wolfish, supra, 441 U.S. at 559.

Likewise, Justice Jackson's concern even earlier captures the spirit of the moment:

> The choice is not between order and liberty. It is between liberty with order and anarchy without either. There is a danger that, if the Court does not temper its doctrinaire logic with a little practical wisdom, it will convert the constitutional Bill of Rights into a suicide pact.

Terminiello v. City of Chicago, 337 U.S. 1, 37 (1949), Jackson, J., dissenting.

The opinion below requires local jail officials to speculate about the circumstances which might allow searches of the type involved in this case other than on individualized suspicion. The Ninth Circuit suggests that it *might* be permissible to conduct limited strip searches on new arrestees if the drug charges had been different.

Would drug possession be enough, or would possession for sale be required? Would there be a quantity requirement? Is an arrest for possession of one gram of cocaine sufficient, or must the arrestee possess a pound? These questions are not answered by the Ninth Circuit.

Other statements in the opinion hint that it may be acceptable to strip search inmates entering the general jail population. Another comment suggests that the practice cannot be prophylactically adopted to forestall institutional violence, but if there were a documented track record of serious injuries, a visual strip search might be permissible.

An ivory tower rationale that perhaps merger with a theoretical general jail population would justify the search

is not based in reality. The opinion below does not actually state that merger alone would justify the search but suggests that it might.

The record below was documented by petitioner in the district court to demonstrate that respondent admitted being housed in a jail cell for several hours with other inmates who were dressed out for housing, on their way to state correctional facilities or another county facility to house female arrestees. The busy hum of activity on a booking floor mixes recent arrestees and remands, court ordered to begin serving their sentences on a date certain, with transferee inmates and those being re-booked for in-custody offenses.

The concept that a local jail has to demonstrate a track record of disaster and cannot prophylactically adopt policies to safeguard staff and inmates is at variance with *Bell v. Wolfish*. Judicial deference is accorded not merely because the jail administrator ordinarily will have a better grasp of his or her domain than a judge, but also because the operation of correctional facilities is uniquely the province of the executive and legislative branches of government, not the judiciary. 441 U.S. at 548.

As this Court once clarified:

> [C]ourts are ill equipped to deal with the increasingly urgent problems of prison administration and reform. . . . [T]he problems of prisons in America are complex and intractable, and, more to the point, they are not readily susceptible of resolution by decree. . . . Running a prison is an inordinately difficult undertaking that requires expertise, planning, and the

> commitment of resources, all of which are peculiarly within the province of the legislative and executive branches of government. Prison administration is, moreover, a task that has been committed to the responsibility of those branches, and separation of powers concerns counsel a policy of judicial restraint. Where a state penal system is involved, federal courts have . . . additional reason to accord deference to the appropriate prison authorities.

Turner v. Safley, 482 U.S. 78, 85 (1987).

The problem with requiring local officials to guess at the circumstances allowing strip searches is that the price of guessing wrong is a financially disastrous lawsuit, as the subsequent class action filed by respondent's counsel clearly demonstrates. It is not helpful to an understanding of the Constitution, nor is it beneficial to the strapped treasury of local governments, to require officials to speculate about the answers to constitutional questions.

A chief problem with the opinion below is that it exposes local government to lawsuits whether a search is conducted or not. If county jail administrators try to discern criteria for limited strip searches, such as offense categories logically linked to current possession of contraband drugs and paraphernalia, they are held to have violated the Constitution.

On the other hand, if jail officials do not conduct an adequate search, and an inmate has a baggie of heroin rupture in a body cavity, the jail is sued for not having a policy which would permit the limited strip search to detect

foreseeable categories of smugglers, such as drug users. When sued under those circumstances, local jails cannot talismanically offer the opinion below as a defense because the Ninth Circuit suggests that a certain number of disastrous consequences *might* show that the policy was needed as a deterrent. Each new plaintiff can simply allege that the nature or number of injuries from concealed drugs and their paraphernalia rendered the search reasonable at that point in time.

III.

THE NINTH CIRCUIT DISREGARDED THE PRINCIPLES ENUMERATED IN *BELL V. WOLFISH* OF FEDERALISM AND SEPARATION OF POWERS.

The Ninth Circuit paid lip service to the concepts of federalism and separation of powers but disregarded them. A jail manager's reliance upon a modern penal statute and statements in the circuit's jurisprudence should give sufficient latitude for this practice.

These principles are the bedrock of our federalist union. The concepts of federalism and separation of powers have properly preserved multi-focal power centers in this country.

States may adopt reasonable laws to govern the operation of their institutions. The judicial branch of government must allow reasonable deference to the executive branch's determination of what policies and practices will safeguard its officials and their charges.

The statute at issue is not an anachronistic bastion of unreasoned sadism. It is a detailed modern penological enactment which evinces ample solicitude for the rights of citizens while enabling jail officials to filter out

instrumentalities which pose a risk to inmates and custody staff alike.

The state statute at issue is of relatively modern vintage, having been adopted in March, 1984. As the concurring judge noted below, it has never fallen into "desuetude." To the contrary, state appellate decisions have affirmed its constitutionality. *People v. Wade*, 208 Cal.App.3d 304, 307-308 (1989).

The statute's preamble includes a legislative declaration that law enforcement policies for conducting strip searches of pretrial detainees vary widely throughout California. Some people, it declares, have been arbitrarily subjected to body cavity searches after arrests for minor misdemeanor and infraction offenses. Some local policies present search practices violative of federal constitutional rights and must therefore be brought into uniformity with due attention to those rights.

California Penal Code Section 4030(a) states that the legislature intends to protect the state and federal constitutional rights of Californians by establishing a limitation on strip searches. The statute further defines a strip search in detail as a visual-only body cavity examination. The statute further prohibits incarceration with long-term housing assignments before an opportunity to post bail has been offered except if the arresting charges pertain to drugs, weapons, or violence.

The statute builds in safeguards. The search must be approved by a superior officer. That approval must be in writing. The authorization must state the specific circumstances upon which the requisite informational level of reasonable suspicion is ascertained. The search must be visual only.

The statute provides both criminal and civil penalties for its violation. It is a misdemeanor to violate the statute (Penal Code § 4030(n)). The civil penalty is $1,000 in damages or actual damages, whichever is greater (§ 4030(p)).

If the court's opinion below stands, sheriffs can no longer rely upon their own judgment. Nor can jail administrators depend upon a modern penal statute, even one echoed in published same-circuit pronouncements.

CONCLUSION

Petitioner urges the Court to grant certiorari based upon the reasons and authorities presented in this petition. This Court's observation that "unauthorized use of narcotics is a problem that plagues virtually every penal and detention center in the country," *Block v. Rutherford*, 468 U.S. 576, 588 (1984), grows truer with each passing year.

The opinion below unreasonably requires jail managers to speculate about the circumstances under which body cavity examinations will be constitutionally permissible. The opinion states that a track record of disaster, other drug charges, or general population merger might allow the search but does not go as far as to say that such circumstances would permit the examination.

Municipalities face potential lawsuits if they do *not* search. The next class of plaintiffs will simply identify one of the three open-ended possibilities as having required the search when they are attacked by an inmate wielding a concealed razor blade. When an inmate overdoses on a controlled substance secreted in a body cavity, he will be quick to sue his jailers for not conducting a search predicated upon his arresting charge. Yet if such jails do

perform the practice, they have no assurance from the Ninth Circuit that such a practice would be tolerable.

The constitutional uncertainty of a practice required to enhance the security of each inmate, other inmates, and custody personnel cannot be lightly brushed aside. These circumstances require this Court to hear the case and establish uniformity on this subject among the circuits.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT FILED APRIL 20, 2006

FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

NOELLE WAY, *Plaintiff–Appellee,* v. COUNTY OF VENTURA; ROBERT BROOKS; KAREN HANSON, *Defendants-Appellants.* and ROBERT ORTIEZ, Ventura Police Officer, *Defendant.*	No. 04-55457 D.C. No. CV-01-05401-CBM OPINION

Appeal from the United States District Court
for the Central District of California
Consuelo B. Marshall, Chief Judge, Presiding

Argued and Submitted
December 8, 2005 — Pasadena, California

Filed April 20, 2006

Before: Pamela Ann Rymer and Kim McLane Wardlaw, Circuit Judges, and Edward C. Reed, Jr.,* District Judge

Opinion by Judge Rymer;
Concurrence by Judge Wardlaw

SUMMARY

Criminal Law and Procedure/Search and Seizure

The court of appeals affirmed a judgment of the district court in part, and reversed it in part. The court held that subjecting an arrestee to a strip search with visual cavity inspection during the booking process on a misdemeanor charge of being under the influence of a drug can violate the arrestee's constitutional right to be free of an unreasonable search.

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*The Honorable Edward C. Reed, Jr., Senior United States District Judge for the District of Nevada, sitting by designation.

Appellee Noelle Way brought a civil rights action under 42 U.S.C. § 1983 in district court in California against appellant police officers Robert Brooks and Karen Hanson, as well as the county of Ventura, alleging that they violated her civil rights under the Fourth and Fourteenth Amendments by subjecting her to a body cavity search following her arrest on a misdemeanor charge of being under the influence of a drug. Hanson conducted a pat down search of Way before obtaining permission for the visual cavity search, and it turned up nothing. Way was held with several other detainees, but was not in the facility for long and was never put into the general jail population. The booking policy of the Ventura County Sheriff's Department provided for a visual body cavity search of all persons arrested on fresh misdemeanor drug charges. Brooks and Hanson maintained that the purpose of the search protocol was to provide facility security and to ensure the inmate's health and safety, and that inmates had "sometimes" ingested drugs to evade detection. The parties both filed motions for summary judgment. The district court ruled that the search violated Way's constitutional rights because individualized suspicion is required for arrestees who are not admitted to the general jail population. It denied qualified immunity to Brooks and Hanson, ruling that a reasonable officer reviewing Ventura's policy and the established law would have recognized that the Sheriff's Department's policy was unconstitutional because it did not further any legitimate penological interests.

Brooks and Hanson appealed.

[1] Courts assess the constitutionality of a search by balancing the need for the particular search against the invasion of personal rights that the search entails. This requires a court to weigh the scope of the particular intrusion, the manner in which it is conducted, the

justification for initiating it, and the place in which it is conducted. [2] The scope of the intrusion here was indisputably a frightening and humiliating invasion, even when conducted with all due courtesy. Its intrusiveness could not be overstated.

[3] Brooks and Hanson failed to show any link between their blanket strip search policy and legitimate security concerns for detainees such as Way. They made only a conclusory submission regarding the purpose of the search protocol, and failed to adduce evidence of any deterrent effect on persons such as Way who were spontaneously arrested and detained temporarily at the facility for being under the influence. [4] The court of appeals could not see how the charge of being under the influence of a drug necessarily posed a threat of concealing (and thereby using or trafficking) additional drugs in jail during the limited time between booking and bail, or booking and placement in the general population. If not, it was unreasonable to assume that Way harbored drugs in some cavity or other. Reasonable suspicion may be based on such factors as the nature of the offense, the arrestee's appearance and conduct, and the prior arrest record. Way was under the control of the arresting officer from the time she was taken into custody at work until booking. The officer perceived no indication that she was carrying drugs or contraband. Hanson conducted a pat down search before obtaining permission for the visual cavity search, and it turned up nothing. Way was held with several other detainees, but was not in the facility for long and was never put into the general jail population. In these circumstances, it had to be concluded that an arrest for being under the influence of a drug does not supply reasonable suspicion that drugs are concealed in a bodily cavity. [5] As there was no evidence that security concerns required strip searching all arrestees on all drug offenses before placement in the general jail population, and none that all persons

arrested for being under the influence of a drug were likely to have concealed more drugs in a bodily cavity, the Sheriff's Department's blanket policy could not be a proxy for reasonable suspicion. There was no individualized suspicion that Way concealed drugs in a bodily cavity. Therefore, subjecting her to a strip search with visual cavity inspection offended her constitutional right to be free of an unreasonable search.

[6] If the law did not put Brooks and Hanson on notice that their conduct would be clearly unlawful, summary judgment based on qualified immunity was appropriate. **[7]** Prior to Way's search, the Ninth Circuit had never previously addressed the constitutionality of a body cavity search policy premised on the nature of any drug offense. More importantly, the Ninth Circuit had held that the nature of the offense alone may provide reasonable suspicion, and twice pointed to charges involving drugs, contraband and violence as the kind of offense that might give rise to reasonable suspicion. In these circumstances, it could not be concluded that a reasonable officer would necessarily have realized that relying on a department policy that excepted arrestees being held on controlled substance offenses from the general prohibition on strip searches, and subjecting Way to a strip search with visual cavity inspection pursuant to it, was unconstitutional. **[8]** It had to be concluded that a reasonable official in the position of Brooks and Hanson would not have understood that following the jail's policy violated Way's rights because the unconstitutionality of the search they conducted was not clearly established at the time. The district court's denial of qualified immunity to Brooks and Hanson had to be reversed.

Judge Wardlaw concurred, disagreeing, however, that the court of appeals could find clearly established law in this case only if it had previously addressed the

constitutionality of a strip and body cavity search of a misdemeanor drug arrestee; to the contrary, a constitutional right may be clearly established when the reasoning, though not the holding of a prior decision applies to a set of facts, and officials can still be on notice that their conduct violates established law even in novel factual circumstances.

COUNSEL

Alan E. Wisotsky and Jeffrey Held, Law Offices of Alan E. Wisotsky, Oxnard, California, for the defendants-appellants.

Earnest C.S. Bell, Law Offices of Earnest C.S. Bell, Ventura, California, for the plaintiff-appellee.

OPINION

RYMER, Circuit Judge:

We must decide whether Ventura County Sheriff Bob Brooks and Deputy Karen Hanson are entitled to qualified immunity for conducting a strip search with a visual cavity inspection of Noelle Way during the booking process at a pre-trial detention facility on a misdemeanor charge of being under the influence of cocaine or methamphetamine in violation of California Health & Safety Code § 11550(a). This requires us first to decide whether a strip search with a visual cavity inspection can be justified based on Ventura County's blanket strip-search policy allowing such a search for arrestees charged with any controlled substance offense before placement in the general jail population. The district court held that the search was unconstitutional, and we agree. However, it was not clearly

established at the time of Way's booking that strip searching persons arrested on drug charges is unreasonable. As the district court thought otherwise on this issue, we reverse.

I

On September 6, 2000, Ventura Police Officer Ortiz encountered Way at her work place, the Red Cove Bar, where she was a bartender. He observed that she had dilated pupils, a rapid pulse rate, a nervous attitude and rapid speech. Based on these observations, he suspected that she was under the influence of cocaine or methamphetamine, a misdemeanor violation of California Health & Safety Code § 11550(a), and arrested her at 2:10 A.M. A blood sample taken from Way at a hospital the night of the arrest revealed that the officer's suspicion was incorrect.

Meanwhile, Ortiz took Way to Ventura County's pretrial detention facility for booking. The booking policy of the Ventura County Sheriff's Department provided for a visual body cavity search of all persons arrested on fresh misdemeanor drug charges. The search must be performed by a deputy of the same sex as the detainee, and it involves no touching. The person arrested was to be searched immediately upon booking, without a waiting period for posting bail.

Pursuant to the policy, Hanson sought and obtained her supervisor's approval to perform a body cavity search upon Way. The sole justification was that Way had been arrested for violating California Health & Safety Code § 11550(a). According to Hanson, "the nature of the charges is viewed as providing the reasonable suspicion required under the law to perform a visual strip search."

The search involved a visual inspection of Way's unclothed body cavities, and it took place in a private room with only Hanson present. Hanson directed Way to remove all her clothing. She then directed Way to remove her tampon and to tear it and discard it in a wastebasket. Pursuant to the search policy, Way was required to "bend forward, spread the buttocks, and cough to allow for a visual inspection of the anal area" as well as to "spread her labia at the same time to allow a check of the vaginal area." The search yielded no contraband, weapons or drugs.

The booking process lasted 26 minutes, from 3:10 A.M. to 3:36 A.M. Within 20 minutes after the completion of the body cavity search, Way learned the amount of her bail. She was placed in a holding cell with five or six other women, where she was allowed to make phone calls. She remained there for several hours. She then posted bail, and was released without entering the jail's general population.

Way brought this civil rights action under 42 U.S.C. § 1983 against Brooks and Hanson, as well as the County of Ventura, alleging that they violated her civil rights under the Fourth and Fourteenth Amendments by subjecting her to a body cavity search following her arrest. The parties both filed motions for summary judgment. The district court held that the search violated Way's constitutional rights because individualized suspicion is required for arrestees who are not admitted to the general jail population. It denied qualified immunity to Brooks and Hanson on the basis of *Giles v. Ackerman,* 746 F.2d 614, 616-17 (9th Cir. 1984) (per curiam), *overruled on other grounds by Hodgers-Durgin v. de la Vina,* 199 F.3d 1037, 1040 n. 1 (9th Cir. 1999) (en banc); *Kennedy v. Los Angeles Police Dep't,* 901 F.2d 702, 711 (9th Cir. 1990) (as amended), *implied overruling on other grounds recognized by Act Up!/Portland v. Bagley,* 971 F.2d 298, 301 (9th Cir.

1992); and *Fuller v. M.G. Jewelry*, 950 F.2d 1437, 1446 (9th Cir. 1991), holding that a reasonable officer reviewing Ventura's policy and the established law would have recognized that the Sheriff Department's policy was unconstitutional because it did not further any legitimate penological interests[1]. That ruling is the subject of this appeal.

II

We analyze qualified immunity using the two-step inquiry set forth in *Saucier v. Katz*, 533 U.S. 194 (2001). The first step of the *Saucier* analysis requires us to decide whether this body cavity search violated Way's constitutional rights. *Id.* at 201. If so, "the next, sequential step is to ask whether the right was clearly established." *Id.* For a right to be clearly established, its contours " 'must be sufficiently clear that a reasonable official would understand that what he is doing violates the right.' " *Id.* at 202 (quoting *Anderson v. Creighton*, 483 U.S. 635, 640 (1987)). The protection afforded by qualified immunity "safeguards 'all but the plainly incompetent or those who knowingly violate the law.' " *Brewster v. Bd. of Educ. of the Lynwood Unified Sch. Dist.*, 149 F.3d 971, 977 (9th Cir. 1998) (quoting *Malley v. Briggs*, 475 U.S. 335, 341 (1986)).

A

Brooks and Hanson argue that the visual body cavity search violated no constitutional rights because Sheriff's Department officials are entitled to deference on jail

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[1] Brooks and Hanson previously filed an appeal from the district court's order denying qualified immunity, which we dismissed as premature because the court had not also determined whether Way's constitutional rights were violated. *Way v. County of Ventura*, 348 F.3d 808 (9th Cir. 2003).

security matters, and their interest in securing this jail during the booking process outweighs Way's right to be free from a compulsory visual inspection of her genitalia and anus. They also contend that the Sheriff Department's strip search policy complies with state law as set out in California Penal Code § 4030.[2] Way responds that drug charges alone are insufficient to justify such an extreme intrusion, where she was merely a misdemeanor arrestee charged with being under the influence of a controlled

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[2]California Penal Code § 4030(a) provides:

> The Legislature finds and declares that law enforcement policies and practices for conducting strip or body cavity searches of detained persons vary widely throughout California. Consequently, some people have been arbitrarily subjected to unnecessary strip and body cavity searches after arrests for minor misdemeanor and infraction offenses. Some present search practices violate state and federal constitutional rights to privacy and freedom from unreasonable searches and seizures.
>
> It is the intent of the Legislature in enacting this section to protect the state and federal constitutional rights of the people of California by establishing a statewide policy strictly limiting strip and body cavity searches.

Subsection (f) provides that "[n]o person arrested and held in custody on a misdemeanor . . . offense, except those involving weapons, controlled substances or violence . . . shall be subjected to a strip search or visual body cavity search prior to placement in the general jail population" without "reasonable suspicion based on specific and articulable facts to believe such person is concealing a weapon or contraband, and a strip search will result in the discovery of the weapon or contraband." To conduct such a search requires authorization of the supervising officer on duty, which "shall include the specific and articulable facts and circumstances upon which the reasonable suspicion determination was made by the supervisor." Cal. Penal Code § 4030(f).

substance, who was detained for only a few hours and was never housed with the jail's general population.

[1] We assess the constitutionality of a search by balancing "the need for the particular search against the invasion of personal rights that the search entails." *Bell v. Wolfish,* 441 U.S. 520, 559 (1979). This requires us to weigh "the scope of the particular intrusion, the manner in which it is conducted, the justification for initiating it, and the place in which it is conducted." *Id.*

[2] The scope of the intrusion here is indisputably a "frightening and humiliating" invasion, even when conducted "with all due courtesy." *Giles,* 746 F.2d at 617. Its intrusiveness "cannot be overstated." *Kennedy,* 901 F.2d at 711; *see also Kirkpatrick v. City of Los Angeles,* 803 F.2d 485, 489-90 (9th Cir. 1986) ("[T]he fact that a strip search is conducted reasonably, without touching and outside the view of all persons other than the party performing the search, does not negate the fact that a strip search is a significant intrusion on the person searched . . . ." (citation omitted)); *Thompson v. City of Los Angeles,* 885 F.2d 1439, 1446 (9th Cir. 1989) ("The feelings of humiliation and degradation associated with forcibly exposing one's nude body to strangers for visual inspection is beyond dispute.").

The parties agree that the search took place in a private room, behind closed doors, with no one present but Way and Hanson, and there is no issue about how it was conducted.

This leaves the question whether the intrusion was justified. We recognize the difficulty of operating a detention facility safely, the seriousness of the risk of smuggled weapons and contraband, and the deference we

owe jail officials' exercise of judgment in adopting and executing policies necessary to maintain institutional security. *Wolfish,* 441 U.S. at 546-47, 559. However, this does not mean that a blanket policy is constitutionally acceptable simply by virtue of jail officials' invocation of security concerns. *Giles,* 746 F.2d at 616. Rather, the policy must be " 'reasonably related' to the [detention facility's] interest in maintaining security." *Kennedy,* 901 F.2d at 713 (citing *Wolfish,* 441 U.S. at 540).

[3] Brooks and Hanson failed to show any link between their blanket strip search policy and legitimate security concerns for detainees such as Way. *See Giles,* 746 F.2d at 617 (imposing burden on officials to demonstrate that security interests warrant the serious invasion of privacy inflicted by a strip search policy). They made only a conclusory submission that the purpose of the search protocol is "to provide facility security and to ensure the inmate's health and safety," and that inmates have "sometimes" ingested drugs to evade detection. Nor did they adduce evidence of any deterrent effect on persons such as Way who are spontaneously arrested and detained temporarily at the facility for being under the influence.[3] *Cf. Wolfish,* 441 U.S. at 559 (noting evidence in the record documenting detainees' attempts to secrete money, drugs, weapons and other contraband in body cavities). In effect, they ask us to take security implications on faith. This we cannot do. *See Kennedy,* 901 F.2d at 713 (declining to accept the Los Angeles Police Department's justification for a blanket strip search policy as it rested only on assumptions and societal judgments without documentation of risk).

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[3]Counsel suggested at oral argument that the facility had experienced difficulties since the district court's ruling in this case, but the record contains no evidence of whatever they might be.

Brooks and Hanson maintain that all drug offenses inherently heighten security concerns because of the risk that persons arrested on drug charges will bring drugs with them. Perhaps with respect to other types of drug offenses — about which we express no opinion — but the record shows us nothing about this jail (or any other jail's) experience with those arrested on § 11550(a) charges. We do not disagree that in some cases, the charge itself may give rise to reasonable suspicion; indeed, we so held in *Thompson,* where the felony charged was grand theft auto and the offense was "sufficiently associated with violence to justify a visual strip search." 885 F.2d at 1447. We have also been careful to distinguish charges that involve drugs and contraband as well as violence when invalidating blanket strip search policies applied in other contexts. *See Kennedy,* 901 F.2d at 716 (holding unconstitutional a strip search policy applied to person arrested for stealing a roommate's belongings, observing that "[n]o weapons, no drugs, no contraband, no violent acts of any kind were involved"); *Giles,* 746 F.2d at 618 (declaring unconstitutional a policy requiring that all persons booked on minor traffic offenses be strip searched, while noting that the "offense was minor and was related neither to drugs nor to weapons"). However, we have never said that *all* offenses of any particular nature support reasonable suspicion. To the contrary, the charge in *Kennedy* was for grand theft as it was in *Thompson,* but we held that a strip search policy was unconstitutional as applied to Kennedy because the grand theft charge there arose out of an ordinary disagreement that did not in itself pose a threat of violence in jail.

[4] We cannot see how the charge of being under the influence of a drug necessarily poses a threat of concealing (and thereby using or trafficking) additional drugs in jail during the limited time between booking and bail, or booking and placement in the general population.

If not, it was unreasonable to assume that Way harbored drugs in some cavity or other.[4] "Reasonable suspicion may be based on such factors as the nature of the offense, the arrestee's appearance and conduct, and the prior arrest record." *Giles,* 746 F.2d at 617. Way was under the control of the arresting officer from the time she was taken into custody at work until booking. The officer perceived no indication that she was carrying drugs or contraband. *Compare, e.g., People v. Wade,* 208 Cal.App.3d 304, 306-07, 256 Cal.Rptr. 189, 190-91 (Cal. Ct. App. 1989) (holding that a body cavity search was justified by the arresting officers' observation of the suspect apparently trying to put something beneath his waistband). Hanson conducted a pat down search before obtaining permission for the visual cavity search, and it turned up nothing.[5] Way was held with several other detainees, but was not in the facility for long and was never put into the general jail population. *See Fuller,* 950 F.2d at 1448 ("In determining the constitutionality of strip searches of arrestees, courts have distinguished between searches of detainees who were simply awaiting bail, and searches conducted on inmates admitted or about to be admitted to the general jail population."); *Ward v. County of San Diego,* 791 F.2d 1329, 1333 (9th Cir. 1986) ("In most instances the unreasonableness of a strip search conducted prior to an

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[4]We have no occasion to comment on any other kind of drug offense, which may have different characteristics that might lead to a different analysis on a different record. *See, e.g., United States v. Gonzalez-Rincon,* 36 F.3d 859, 861, 864 (9th Cir. 1994) (discussing narcotics smuggler who carried 73 balloons of cocaine in her rectum and alimentary canal).

[5]At argument, counsel suggested that LSD, for example, can be smuggled on postage stamps or the like that are not readily discoverable during a pat down search. However, there is no evidence to this effect in the record and it is not self-evident that cocaine or methamphetamine (which is what Way was suspected of being under the influence of) are routinely concealed in this way.

[own recognizance] release determination is plain."). In these circumstances, we conclude that an arrest for being under the influence of a drug does not supply reasonable suspicion that drugs are concealed in a bodily cavity.

[5] As there is no evidence that security concerns require strip searching all arrestees on all drug offenses before placement in the general jail population, and none that all persons arrested for being under the influence of a drug are likely to have concealed more drugs in a bodily cavity, the Sheriff Department's blanket policy cannot be a proxy for reasonable suspicion. There was no individualized suspicion that Way concealed drugs in a bodily cavity. Therefore, subjecting her to a strip search with visual cavity inspection offended her constitutional right to be free of an unreasonable search.

B

[6] Having determined that Way's constitutional rights were violated, the remaining question is whether it was clearly established at the time of the search that the search was unconstitutional. *See Saucier,* 533 U.S. at 201. "If the law did not put [Brooks and Hanson] on notice that [their] conduct would be clearly unlawful, summary judgment based on qualified immunity is appropriate." *Id.* at 202.

[7] We had held prior to Way's search that performing a strip search with visual cavity inspection before determining whether the person was eligible for release on his own recognizance could not be justified based on a blanket policy of subjecting all minor offense arrestees to a strip search, *Ward,* 791 F.2d 1329; that a visual body cavity search of a person arrested on an offense that did not involve violence could not be justified by a

blanket policy of subjecting all those arrested for felonies to such a search, *Kennedy,* 901 F.2d 702; and that a strip and body cavity search of all felony arrestees could not be justified based on the jail's blanket search policy regardless of the crime with which they were charged, *Fuller,* 950 F.2d 1437. However, we had never previously addressed the constitutionality of a body cavity search policy premised on the nature of this or any other drug offense. More importantly, we had held that the nature of the offense alone may provide reasonable suspicion, *Thompson,* 885 F.2d at 1447, and twice pointed to charges involving drugs, contraband and violence as the kind of offense that might give rise to reasonable suspicion. *Kennedy,* 901 F.2d at 716; *Giles,* 746 F.2d at 618. In these circumstances, we cannot conclude that a reasonable officer would necessarily have realized that relying on a Department policy that excepted arrestees being held on controlled substance offenses from the general prohibition on strip searches, and subjecting Way to a strip search with visual cavity inspection pursuant to it, was unconstitutional.

The district court came to a different conclusion by analogy to the Tenth Circuit's decision in *Foote v. Spiegel,* 118 F.3d 1416 (10th Cir. 1997). There, a highway patrol officer arrested Foote for being under the influence of marijuana. *Id.* at 1420. She was strip searched when booked at the county jail and was released without being placed in the general jail population. *Id.* at 1421. The court held that the search was unconstitutional, and that the officers were not entitled to qualified immunity. However, *Foote's* qualified immunity analysis turned on the fact that before the Foote search was conducted, *Cottrell v. Kaysville City,* 994 F.2d 730, 734-35 (10th Cir. 1993), clearly established that merely being arrested for driving under the influence of drugs does not justify a strip search. *Foote,* 118 F.3d at 1421. Our law was not so clear (until now),

hence our reluctance to hold Brooks and Hanson personally liable for damages.

[8] We therefore conclude that subjecting Way to a strip search with visual cavity inspection during the booking process on a misdemeanor charge of being under the influence of a drug was not justified by the jail's blanket policy of strip searching all those arrested on charges involving a controlled substance. Undocumented security needs of the jail facility do not outweigh the invasion of Way's personal rights. Nor is such an intrusive search warranted solely on account of the nature of the charge in this case, as being under the influence of a drug does not necessarily indicate that the person has concealed more drugs in a body cavity. This said, a reasonable official in the position of Brooks and Hanson would not have understood that following the jail's policy violated Way's rights because the unconstitutionality of the search they conducted was not clearly established at the time.

AFFIRMED IN PART; REVERSED IN PART.

WARDLAW, Circuit Judge, concurring:

I concur with all but part B of the well-written majority opinion. I depart from the majority because I believe that at the time of Way's body cavity search, the Fourth Amendment principles governing blanket searches prohibited strip and body cavity blanket searches and required individualized reasonable suspicion based on specific and articulable facts before such a search could be conducted on a misdemeanor arrestee. I particularly disagree with the majority's parsimonious approach to the analysis of our precedent, which focuses on the application

of clearly established Fourth Amendment principles to each penal code section we have addressed and not on the well-established principles themselves. The fact of the matter is that Ventura County had an unconstitutional blanket strip search policy which permitted such searches based upon no specific, articulable facts at all — a policy we have repeatedly held unconstitutional. I cannot go so far as to say that under the circumstances the individual officers acted objectively unreasonably, however, only because reasonable officers in Brooks' and Hanson's position could have believed that the Ventura County Sheriff's Department policy comported with the Constitution. Therefore I concur in holding that the officers are entitled to qualified immunity.

I

I disagree that we can find clearly established law in this case only if we have previously addressed the constitutionality of a strip and body cavity search of a misdemeanor drug arrestee. To the contrary, a constitutional right may be clearly established when "[t]he reasoning, though not the holding" of a prior decision applies to a set of facts, *Hope v. Pelzer*, 536 U.S. 730, 743 (2002), and "officials can still be on notice that their conduct violates established law even in novel factual circumstances," *id.* at 741. "Otherwise, officers would escape responsibility for the most egregious forms of conduct simply because there was no case on all fours prohibiting that particular manifestation of unconstitutional conduct." *Deorle v. Rutherford*, 272 F.3d 1272, 1286 (9th Cir. 2001). The Supreme Court has rejected this parsimonious approach to the Fourth Amendment principle of reasonableness, stating that the balancing test fashioned in *Bell v. Wolfish*, 441 U.S. 520, 559 (1979), is "not capable of precise definition or mechanical application."

The clearly established general Fourth Amendment principle of reasonableness, which we have applied to strip and body cavity searches of arrestees, *see Thompson v. City of Los Angeles,* 885 F.2d 1439, 1445 (9th Cir. 1989), rendered the Ventura County blanket strip and body cavity search policy unconstitutional. We have interpreted the principle of reasonableness in the context of misdemeanor pretrial detainees to require application of a standard of individualized reasonable suspicion, such that "arrestees . . . may be subjected to a strip search only if jail officials have a reasonable suspicion that the *particular* arrestee is carrying or concealing contraband or suffering from a communicable disease." *Giles v. Ackerman,* 746 F.2d 614, 615 (9th Cir. 1984) (per curiam) (emphasis added), *overruled in part on other grounds by Hodgers-Durgin v. de la Vina,* 199 F.3d 1037, 1040 n. 1 (9th Cir. 1999) (en banc). Only consideration of the multiplicity of factors giving rise to individualized reasonable suspicion, such as "the nature of the offense, the arrestee's appearance and conduct, *and* the prior arrest record," properly balances the "intrusion on the individual's Fourth Amendment interests against [the] promotion of legitimate governmental interests." *Id.* at 617 (emphasis added). Moreover, "[i]n most instances the unreasonableness of a strip search conducted prior to an [own recognizance] release determination is plain." *Ward v. County of San Diego,* 791 F.2d 1329, 1333 (9th Cir. 1986). We have routinely struck down blanket strip search policies as applied against misdemeanor arrestees, and we have gone so far as to state that "no published state or federal case since *Schmerber v. California,* 384 U.S. 757 (1966) . . . upholds the constitutionality of a blanket policy of strip searches of minor offense arrestees." *Ward,* 791 F.2d at 1332.

While the majority broadly asserts that we held in *Thompson,* 885 F.2d at 1447, that the nature of the charge alone, when it involves drugs, contraband, or violence,

warrants a departure from the standard of individualized reasonable suspicion, I read our holding in *Thompson* much more narrowly. First, we explicitly limited *Thompson* to the facts of the case, stating that "our decision is extremely narrow and only applies to theft of an automobile." *Id.* at 1447 n. 6. Second, the *Thompson* case does not control Way's case because Thompson was strip searched not at the time of booking, but rather when he entered the general county jail population, where he remained for five days. *Id.* at 1442. While this additional factor alone will not justify a strip search, *id.*, "[i]n determining the constitutionality of strip searches of arrestees, courts have distinguished between searches of detainees who were simply awaiting bail, and searches conducted on inmates admitted or about to be admitted to the general jail population," *Fuller v. M.G. Jewelry,* 950 F.2d 1437, 1448 (9th Cir. 1991). The majority bolsters its argument by pointing out that in *Giles,* 746 F.2d at 618, and *Kennedy v. Los Angeles Police Dep't,* 901 F.2d 702, 716 (9th Cir. 1990), *implied overruling in part on other grounds recognized by Act Up!/Portland v. Bagley,* 988 F.2d 868, 872 (9th Cir. 1993), we pointed to charges involving drugs, contraband, and violence as the kind of offenses that might give rise to reasonable suspicion. However, our holdings in those cases considered the nature of the charge only in combination with other specific and individualized factors.

Departure from the standard of individualized reasonable suspicion in deference to the security concerns of prison officials, *see Bell,* 441 U.S. at 559, is appropriate only when there is "sufficient justification for [the] blanket search policy," *Kennedy,* 901 F.2d at 713. We struck down a blanket policy similar to the Ventura County Sheriff's Department's in *Giles,* 746 F.2d at 617 (citing *Bell,* 441 U.S. at 559), because no security concerns comparable to those in *Bell* had been demonstrated. Demonstration of legitimate security concerns is required because the Court

in *Bell* "did not . . . read out of the Constitution the provision of general application that a search be justified as reasonable under the circumstances." *Weber v. Dell,* 804 F.2d 796, 800 (2nd Cir. 1986). As the majority concludes, there is no documentation of security concerns in this case which are serious enough to justify a departure from the general rule requiring individualized reasonable suspicion. The facts of this case amply demonstrate the perils of such a blanket search policy, because all of the circumstances surrounding Way's arrest and detention negate the conclusion that Way, a detainee who had no chance to secrete drugs, was to post bail shortly after her arrest, and who would never be mingled with the general jail population, was concealing contraband. At the time the search was performed, it was clearly established that absent a showing of serious security concerns tipping the balance in favor of the government interest, the Fourth Amendment required application of the standard of individualized reasonable suspicion.

II

While it is generally the case that "[i]f the law was clearly established, the immunity defense ordinarily should fail, since a reasonably competent public official should know the law governing his conduct," *Harlow v. Fitzgerald,* 457 U.S. 800, 818-19 (1982), in measuring the "objective reasonableness" of the officer's conduct we have looked beyond the existing body of case law to whether the officer relied on a state statute, regulation, or official policy that explicitly sanctioned the conduct in question, *see Wilson v. Layne,* 526 U.S. 603, 617 (1999); *Grossman v. City of Portland,* 33 F.3d 1200, 1209 (9th Cir. 1994). While reliance upon a statute does not render the officer's conduct per se reasonable, *Roska v. Peterson,* 328 F.3d 1230, 1252 (10th Cir. 2003), "the existence of a statute or ordinance authorizing particular conduct is a factor which militates in

favor of the conclusion that a reasonable official would find that conduct constitutional," because "police officers on the street are ordinarily entitled to rely on the assumption that the [legislature] ha[s] considered the views of legal counsel and concluded that the ordinance is a valid and constitutional exercise of authority," *Grossman,* 33 F.3d at 1209.

In this case, the Ventura County Sheriff's Department policy authorized the conduct in question. Officers Brooks and Hanson complied with that policy. In addition, California Penal Code § 4030(f) specifically exempts those arrested on misdemeanor "weapons, controlled substances or violence" charges from the general prohibition on strip and body cavity searches of persons arrested for misdemeanors. Because the policy and the state statute had not fallen into desuetude, *Grossman,* 33 F.3d at 1209 n. 19, nor were they "patently violative of fundamental constitutional principles," *id.* at 1209, it was objectively reasonable for officers Brooks and Hanson to rely on the policy and the state statute in performing the strip search on Way. I therefore concur with the majority in finding that the officers are entitled to qualified immunity.

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA DENYING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AND GRANTING IN PART PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT FILED JULY 22, 2002

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

WESTERN DIVISION

NOELLE WAY,	)	No. CV 01-5401 CBM (Ex)
	)	
Plaintiff,	)	**ORDER DENYING**
	)	**DEFENDANTS' MOTION**
	)	**FOR SUMMARY**
COUNTY OF VENTURA,	)	**JUDGMENT AND**
et al.,	)	**GRANTING IN PART**
	)	**PLAINTIFF'S MOTION**
Defendants.	)	**FOR PARTIAL**
	)	**SUMMARY JUDGMENT**
_____	)	

The matters before the Court, the Honorable Consuelo B. Marshall, United States District Judge presiding, are Defendants County of Ventura, Robert Brooks, and Karen Hanson's Motion for Summary Judgment (docket #16) and Plaintiff's Motion for Partial Summary Judgment Against Defendants County of Ventura, Robert Brooks, and Karen Hanson (docket #18). Counsel

appeared before the Court for oral argument. Upon consideration of the papers and arguments presented, the Court DENIES Defendants' Motion for Summary Judgment and GRANTS IN PART Plaintiff's Motion for Partial Summary Judgment.

JURISDICTION

This Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 1331 and 1343.

PROCEDURAL HISTORY

The operative complaint in this action is the First Amended Complaint ("FAC"), filed on December 12, 2001. The FAC alleges violations of the Fourth and Fourteenth Amendments based on illegal search and seizure, illegal arrest and false imprisonment, and invasion of privacy, and a *Monell* claim based on the failure to supervise and train. The FAC also alleges state claims of false imprisonment, false arrest, and invasion of privacy.

Defendants County of Ventura ("County"), Robert Brooks,[1] and Karen Hanson (collectively referred to as "Defendants") filed a Motion for Summary Judgment. Plaintiff filed an Opposition. No Reply has been filed to date. Plaintiff filed her Motion for Partial Summary Judgment. Defendants filed an Opposition. No Reply has been filed to date.

BACKGROUND

The parties submit that the legal issues that the Court needs to resolve are the following:

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[1]Robert Brooks is the Sheriff of the County of Ventura.

1. What constitutes the reasonable suspicion required to conduct a visual unclothed body cavity search of a pretrial detainee?

2. Can the arresting agency's charge that the pretrial detainee violated Health and Safety Code Section 11550, without more, equal the reasonable suspicion needed to justify a visual unclothed body cavity search?

3. Is a policy of performing visual unclothed body cavity searches of pretrial detainees arrested for being under the influence of an illegal controlled substance, in violation of Health and Safety Code Section 11550, constitutional?

4. Constitutionally, before conducting a visual unclothed body cavity search, should a pretrial detainee be given an opportunity to post bail?

5. Was the visual unclothed body cavity search of the plaintiff in accordance with California Penal Code Section 4030?

The Court finds that the issues that have been briefed and are before the Court are whether the policy of conducting visual unclothed body cavity searches of pretrial detainees not placed within the general jail population based solely on the fact that they have been charged with a violation of Health and Safety Code Section 11550[2] is

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[2] Section 11550(a) provides as follows:

> No person shall use, or be under the influence of any controlled substance which is (1) specified in subdivision (b), (c), or (e), or paragraph (1) of subdivision (f) of Section 11054, specified in paragraph (14), (15), (21), (22), or (23) of subdivision (d) of Section 11054, specified in subdivision (b) or (c) of Section 11055, or specified in paragraph (1) or

constitutional and whether the visual unclothed body cavity search of the plaintiff was in accordance with California Penal Code Section 4030.

The parties have stipulated to the following facts for the purposes of the present motions:

1. Plaintiff Noelle Way was arrested on September 6, 2000, at approximately 2:10 a.m. by non-movant defendant Robert Ortiz.

2. Robert Ortiz was acting in the capacity of a City of San Buenaventura police officer when he arrested plaintiff.

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(2) of subdivision (d) or in paragraph (3) of subdivision (e) of Section 11055, or (2) a narcotic drug classified in Schedule III, IV, or V, except when administered by or under the direction of a person licensed by the state to dispense, prescribe, or administer controlled substances. It shall be the burden of the defense to show that it comes within the exception. Any person convicted of violating this subdivision is guilty of a misdemeanor and shall be sentenced to serve a term of not less than 90 days or more than one year in a county jail. The court may place a person convicted under this subdivision on probation for a period not to exceed five years and, except as provided in subdivision (c), shall in all cases in which probation is granted require, as a condition thereof, that the person be confined in a county jail for at least 90 days. Other than as provided by subdivision (c), in no event shall the court have the power to absolve a person who violates this subdivision from the obligation of spending at least 90 days in confinement in a county jail.

3. Officer Ortiz's arrest of the plaintiff took place at her place of employment, the Red Cove bar, located at 1809 East Main Street in the City of San Buenaventura.

4. Officer Ortiz arrested the plaintiff for being, in his opinion, under the influence of a controlled substance in violation of California Health and Safety Code Section 11550(a) at the time of her arrest.

5. The offense for which Officer Ortiz arrested the plaintiff was a misdemeanor.

6. After transporting the plaintiff to the Ventura County Medical Center to obtain a blood sample, Officer Ortiz took the plaintiff to the pretrial detention facility (county jail) to be booked on the stated charge.

7. Plaintiff was a pretrial detainee at all times relevant to her contact with the moving defendants.

8. Defendant Deputy Karen Hanson is a female custody deputy employed by the Ventura County Sheriff's Department who was the booking officer and deputy who performed all activities relating to the plaintiff's booking on September 6, 2000, including reception booking, master booking, and the visual unclothed body cavity search of the plaintiff at the Ventura County Jail; Deputy Hanson has worked for the Ventura County Sheriff's Department for 21 years.

9. Approximately an hour after her arrest, at about 3:10 a.m., the plaintiff arrived at the pretrial detention facility and her booking process began.

10. During the plaintiff's booking process, as part of routine procedure, Officer Ortiz prepared and submitted two

documents to Karen Hanson, the custody deputy handling plaintiff's booking:

(a) One document was the booking information sheet in which Officer Ortiz stated that he had arrested the plaintiff for misdemeanor violation of Health and Safety Code Section 11550(a) at 2:10 a.m. on September 6, 2000, at the Red Cove bar in Ventura, among other information;

(b) The second document prepared by Officer Ortiz was a declaration for probable cause hearing, which he signed under penalty of perjury on September 6, 2000, in which Officer Ortiz stated that he was a peace officer employed by the Ventura Police Department; that at 2:10 a.m. on September 6, 2000, he developed probable cause to form the opinion that the plaintiff was violating Health and Safety Code Section 11550; that he observed the plaintiff exhibit certain symptoms on September 6, 2000, in Ventura indicative of being under the influence of a controlled substance stimulant; that he prepared a police report; and that the plaintiff had been given a chemical test whose results were pending;

11. While defendant Karen Hanson does not recall any particulars about this case or the plaintiff, her custom and practice would be to read the two documents prepared by Officer Ortiz during the course of booking the plaintiff.

12. The Ventura County Sheriff's Department, in the operation of its pretrial detention facility, contends that a fresh misdemeanor charge of violating Health and Safety Code Section 11550 supplies the basis for a visual unclothed body cavity search.

13. Under the policy of the Ventura County Sheriff's Department, a visual unclothed body cavity search is performed by a custody deputy of the same sex as the

pretrial detainee and does not involve any touching of the person of the pretrial detainee by the custody deputy.

14. The plaintiff was booked between 3:10 a.m. and 3:36 a.m. by Deputy Hanson.

15. Deputy Hanson obtained permission to perform the visual unclothed body cavity search upon the plaintiff from Senior Deputy Dave Brantley, who authorized Deputy Hanson to conduct the strip search of the plaintiff.

16. Approximately 20 minutes transpired between the time the plaintiff was informed of the amount of her bail and the time of the performance by Deputy Hanson of the visual unclothed body cavity search of the plaintiff.

17. Deputy Hanson performed a visual-only unclothed body cavity search of the plaintiff.

18. The visual unclothed body cavity search took place in a private room in the women's booking area of the pretrial detention facility with only Deputy Hanson and the plaintiff present.

19. During the search, defendant Hanson observed that the plaintiff had a tampon and required the plaintiff to remove, tear, and discard the tampon in the adjacent wastebasket.

20. If a pretrial detainee is having a menstrual period, she will be required to remove her tampon, pull it apart during the strip/visual body cavity search, and discard it in the wastebasket.

21. Deputy Hanson performed the visual unclothed body cavity search of the plaintiff solely because the plaintiff was charged by Officer Ortiz with violating Health and Safety

Code Section 11550; Deputy Hanson did not have any other information leading her to believe that the plaintiff was concealing contraband in her body cavities.

22. It is the policy of the Ventura County Sheriff's Department in the operation of its pretrial detention facility to perform visual unclothed body cavity searches of every pretrial detainee arrested for alleged violation of Health and Safety Code Section 11550, a misdemeanor.

23. Upon the plaintiff's arrival at the pretrial detention facility, in women's booking, Deputy Hanson performed a pat-down search of plaintiff, during which Deputy Hanson did not see or feel anything which would lead her to believe that the plaintiff was concealing drugs or weapons on her person or in her body cavities.

24. There is no waiting period to see if an inmate arrested on charges of Health and Safety Code Section 11550 will be able to post bail before performing the visual unclothed body cavity search of such pretrial detainee.

25. The strip search of the plaintiff did not yield any contraband, weapons, or drugs hidden on her person.[3]

26. No charges were ever filed against the plaintiff.

27. The blood sample obtained from the plaintiff at the Ventura County Medical Center and analyzed by the Ventura County Sheriff's Department Criminalistics Laboratory did not reveal the presence of any controlled substances or drugs in the plaintiff's blood — the test was negative for controlled substances.

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[3] Defendants dispute the relevance of Facts 26-29.

28. The plaintiff contends that while naked, she was called derogatory and insulting names by defendant Deputy Hanson, such as "raunch" and "whore."

Defendants supplemented the Joint Statement with additional facts, to which Plaintiffs have not stipulated. Defendants provide declarations stating that the purpose of conducting visual unclothed body cavity searches is to provide facility security and ensure the health and safety of the individuals, that multiple female arrestees may be held in the same holding cell while they are being booked, and that the purpose of searching Plaintiff was to ascertain whether she had concealed drugs or drug paraphernalia.

DISCUSSION

I. Cross Motions for Summary Judgment as to Defendants County, Brooks, and Hanson

A. Standard of Law

Summary judgment against a party is appropriate when "the pleadings, dispositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is *no genuine issue as to any material fact* and that the moving party is *entitled to a judgment as a matter of law*." FED. R. CIV. P. 56(c) (emphasis added). ***[Redaction by court]*** initial burden of informing the court of the basis for its motion and of identifying those portions of the pleadings and discovery responses which demonstrate the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S.Ct. 2548, 2553, (1986). Where the nonmoving party will have the burden of proof at trial, the movant can prevail merely by pointing out that there is an absence of evidence to support the nonmoving party's case. *See id.* If the moving party meets its initial burden, the nonmoving

party must then set forth, by affidavit or as otherwise provided in Rule 56, "specific facts showing that there is a genuine issue for trial." FED. R. CIV. P. 56(e); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250, 106 S.Ct. 2505, 2511 (1986).

In judging evidence at the summary judgment stage, the Court does not make credibility determinations or weigh conflicting evidence and draws all inferences in the light most favorable to the nonmoving party. *T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors Ass'n*, 809 F.2d 626, 630-31 (9th Cir. 1987). The evidence presented by the parties must be admissible. FED. R. CIV. P. 56(e). ***[Redaction by court]*** affidavits and moving papers is insufficient to raise genuine issues of fact and defeat summary judgment. See *Thornhill Pub. Co., Inc. v. GTE Corp.*, 594 F.2d 730, 738 (9th Cir. 1979).

B. Analysis

1. Constitutionality of Visual Unclothed Body Cavity Search

The Supreme Court addressed visual unclothed body cavity inspections of pretrial detainees in institutional settings in *Bell v. Wolfish*, 441 U.S. 520, 99 S. Ct. 1861 (1979), holding that such inspections could be conducted on less than probable cause without violating the reasonableness standard of the Fourth Amendment. *See Bell*, 441 U.S. at 559-60. "In determining whether an institutional search policy is reasonable under the Fourth Amendment, a court must balance 'the need for the particular search against the invasion of personal rights that the search entails.'" *Fuller v. M.G. Jewelry*, 950 F.2d 1437, 1445 (9th Cir. 1991) (quoting Bell, 441 U.S. at 559). The Supreme Court set forth factors to be considered in determining reasonableness: the scope of the intrusion, the

manner in which it is conducted, the justification for initiating it, and the place in which it is conducted. *See id.* at 559. The Ninth Circuit has held that such searches must be supported by reasonable suspicion that the arrestee "is carrying or concealing contraband." *See Kennedy v. Los Angeles Police Department,* 901 F.2d 702 (9th Cir. 1990) (citing *Giles v. Ackerman*, 746 F.2d 614 (9th Cir. 1984)). In determining whether there is reasonable suspicion, courts should consider the nature of the offense, the arrestee's appearance and conduct, and the prior arrest record. *See Giles*, 746 F.2d at 716. The rationale for allowing visual unclothed body cavity searches of pretrial detainees supported by less than probable cause "is to protect prisons and jails from smuggled weapons drugs or other contraband which pose a threat to the safety and security of penal institutions." *Fuller*, 950 F.2d at 1447.

To hold the County liable, the Plaintiff must show that the County maintained a custom, policy, or practice that caused a violation of her federal constitutional rights. *Monell v. New York City Department of Social Services*, 436 U.S. 658, 691 (1978). The parties have stipulated that the visual unclothed body cavity search of Plaintiff was conducted pursuant to the County's policy.

The parties have stipulated that the *only* fact supporting the search of Plaintiff was that she had been charged with violating Health and Safety Code Section 11550. Defendants argue that their search policy is justified because it ensures that arrestees do not injure themselves by ingesting drugs or their containers and to make sure that they do not injure or pass drugs to other arrestees who are also being held at the pretrial detention facility. Defendants provide the declaration of Bonnie Gatling, facility administrative sergeant in charge of training custody deputies at the Ventura County Pretrial Detention Facility in support of this proposition. She states that "inmates

have occasionally managed to evade our facility security protocols and ingested drugs or their containers, usually balloons." Gatling Decl. at ¶8. Defendants provide no evidence regarding whether these inmates were charged with violating Health and Safety Code Section 11550, or whether visual unclothed body cavity searches of pretrial detainees charged with violating Health and Safety Code Section 11550 have resulted in the discovery of concealed drugs or contraband or prevented injury to the detainees. Therefore, Defendants have not established that the policy of conducting visual unclothed body cavity searches of pretrial detainees charged with violating Health and Safety Code Section 11550 effectively promotes the stated justification for the search.[4]

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[4] The Court notes the concerns expressed by the Supreme Court and the Ninth Circuit that courts not ***[redaction by court]*** for those of the jails' administrators. *See Giles*, 746 F.2d at 617 (citing *Block v. Rutherford*, 468 U.S. 576, 584-85, 104 S.Ct. 3227, 3232 (1984). The deference accorded jail administrators does not exempt Defendants from showing that the jail's interests warrant the level of intrusion caused by their policy. *See Giles*, 746 F.2d at 617 (holding that the policy of strip searching all persons booked into the jail was unconstitutional because the County had not demonstrated that its security interests warranted "serious invasion of privacy inflicted by its policy"). Although in *Giles* the Ninth Circuit required that the County make such a showing, in *Thompson v. City of Los Angeles*, 885 F.2d 1439, 1447 (9th Cir. 1989), the Ninth Circuit did not. *See Thompson*, 885 F.2d at 1447 (holding, without considering the effectiveness of the search, that the offense of grand theft auto is "sufficiently associated with violence to justify a visual strip search"). The two cases are distinguishable however, in that in *Giles*, the pretrial detainee was not placed within the general jail population whereas in *Thompson*, the pretrial detainee was placed within the general jail population. This suggests that jail administrators are afforded greater deference when a pretrial detainee is intermingled with the general jail population than when a pretrial detainee is not placed within the general jail population, however, greater deference will not be afforded absent a showing that such intermingling was unavoidable. *See Giles*, 746 F.2d 618-19 (stating that heavy reliance on the intermingling of temporary detainees with the general jail

The present case is analogous [to] a Tenth Circuit case, *Foote v. Spiegel*, 118 F.3d 1416 (10th Cir. 1997). In *Foote*, a highway patrol officer arrested Foote for being under the influence of marijuana. A search of Foote's vehicle and a thorough pat-down search of Foote's person disclosed no drugs. In addition, Foote did not engage in any behavior consistent with an attempt to hide something beneath her clothing. Foote was booked at the County Jail and strip searched, which revealed no drugs. Foote was never placed in the general jail population and was released on bond shortly after her confinement. The Tenth Circuit held as follows:

> [B]ecause Foote had no opportunity to hide anything beneath her clothing after [the highway patrol officer] had stopped her vehicle and a thorough pat-down search at the jail had revealed no drugs, the strip search could be justified only if it were reasonable to believe persons driving while under the influence of marijuana, who have no particular reason to expect they will be searched, routinely carry a personal stash in a body cavity. That belief is unreasonable.

Foote, 118 F.3d at 1426 (distinguishing cases in which possession of drugs or drug paraphernalia provided reasonable suspicion for strip search).

Similarly, the facts before the Court in the instant case indicate that Officer Ortiz arrested Plaintiff for being under the influence of a controlled substance. Deputy Hanson conducted a pat-down search of Plaintiff, during which Deputy Hanson did not see or feel anything that

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population was misplaced because such intermingling was "limited and avoidable") (internal quotations omitted).

would lead her to believe that the Plaintiff was concealing drugs or weapons on her person or in her body cavities. There is no evidence that Plaintiff engaged in any behavior consistent with an attempt to hide something beneath her clothing, and Defendants do not contend that Plaintiff had any opportunity to hide drugs from the time she was stopped by Officer Ortiz until the time she underwent the visual unclothed body cavity search. As part of the booking process of Plaintiff at the pretrial detention facility, Deputy Hanson conducted a visual unclothed body cavity search of Plaintiff, which revealed no contraband, weapons, or drugs. There is no evidence that Plaintiff was ever placed in the general jail population. Plaintiff was released on bond approximately five to eight hours after her arrival at the pretrial detention center.[5] Thus, the Court finds that under these circumstances, it is unreasonable to believe that a person under the influence of a controlled substance in violation of Health and Safety Code Section 11550 "routinely carr[ies] a personal stash in a body cavity." The Court holds that the visual unclothed body cavity search of Plaintiff was unconstitutional.

In evaluating the necessity of a strip search, courts have consistently recognized a distinction between detainees awaiting bail and those entering the jail population. *Fuller*, 950 F.2d at 1448; *see also Cottrell v. Kaysville City*, 994 F.2d 730, 735 (10th Cir. 1993) ("We agree that the security concerns inherent in a bail situation are very different from those present when the detainee will enter the jail for a greater length of time."); *Logan v. Shealy*, 660 F.2d 1007, 1013 (4th Cir. 1981) (considering fact that detainee would not be intermingled with the jail population

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[5] Plaintiff's counsel represented to the Court at the hearing that Plaintiff was released five to six hours after her arrival. Defendants' counsel represented to the Court at the hearing that Plaintiff was released eight hours and ten minutes after her arrival.

as one of many factors in determining that strip search was not justified). In this case, counsel for Plaintiff and Defendants represented to the Court at the hearing that Plaintiff posted bail, and there is no evidence that she was housed with the general jail population. Therefore, the Court expresses no opinion on the constitutionality of a visual unclothed body cavity search of an arrestee charged with violating Health and Safety Code Section 11550 who is searched prior to entering the general jail population.

The Court rejects Plaintiff's contention that the reasonable suspicion determination must *always* be made on a "case-by-case" basis. In *Kennedy*, the Ninth Circuit stated that in certain instances, "the charge itself may give rise to reasonable suspicion." *Kennedy*, 901 F.2d at 716 (citing *Thompson v. City of Los Angeles*, 885 F.2d 1439, 1447 (9th Cir. 1989), which held that the offense of grand theft auto is sufficiently violent to authorize a blanket strip search policy applicable to arrestees charged with it who are to be intermingled with the general jail population).

2. California Penal Code Section 4030

Plaintiff argues that "the visual unclothed body cavity search of Plaintiff was not in accordance with California Penal Code Section 4030." Plaintiff argues that the California Penal Code Section 4030 requires that misdemeanor arrestees must be given a minimum of three hours to post bail before being placed in the general jail population. California Penal Code Section 4030(g) exempts from this requirement arrestees who have been charged with offenses involving controlled substances. Further, there is no evidence before the Court that Plaintiff was ever placed into the general jail population. Accordingly, there is no evidence before the Court from which it could conclude that California Penal Code Section 4030 was violated.

CONCLUSION

Based on the foregoing, Defendants' Motion for Summary Judgment is DENIED, and Plaintiff's Motion for Partial Summary Judgment is GRANTED IN PART. The Court finds that the search of Plaintiff was conducted pursuant to the County's strip search policy, that the search constitutes a violation of Plaintiff's Fourth Amendment rights, and that the Defendants are liable for damages proximately caused by the search. Defendants may file motions addressing whether they are entitled to qualified immunity.

SO ORDERED.

DATE: July 22, 2002 /s/
CONSUELO B. MARSHALL
UNITED STATES DISTRICT JUDGE

APPENDIX C— ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT DENYING THE PETITION FOR REHEARING FILED MAY 31, 2006

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

NOELLE WAY, Plaintiff-Appellee, v. COUNTY OF VENTURA; ROBERT BROOKS; KAREN HANSON, Defendants-Appellants, and ROBERT ORTIEZ, Ventura Police Officer, Defendant.	No. 04-55457 D.C. No. CV-01-05401-CBM Central District of California, Los Angeles O R D E R

Before: RYMER and WARDLAW, Circuit Judges, and REED,* District Judge.

*The Honorable Edward C. Reed, Jr., Senior United States District Judge for the District of Nevada, sitting by designation.

The panel has voted to deny the petition for rehearing. Judges Rymer and Wardlaw have voted to deny the petition for rehearing en banc, and Judge Reed so recommends.

The full court has been advised of the petition for rehearing en banc, and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. 35.

The petition for rehearing and petition for rehearing en banc are DENIED.

No. 06-280

IN THE

Supreme Court of the United States

COUNTY OF VENTURA,

Petitioner,

v.

NOELLE WAY,

Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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October 2006

QUESTION PRESENTED

The petition for certiorari lists five questions presented in this case. Respondent respectfully suggests that these five questions are properly reduced to one:

May county jail officials, consistent with the Fourth Amendment, conduct a visual body-cavity strip search of a person arrested on a misdemeanor charge of being under the influence of a controlled substance, pursuant to a blanket county policy requiring that such searches be conducted on all persons arrested on such a charge, in the absence of reasonable suspicion that the individual arrestee is concealing weapons or contraband in her body cavities and without regard to whether the arrestee will enter the general jail population.

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RESPONDENT'S BRIEF IN OPPOSITION

Although petitioner County of Ventura contends that this case presents multiple questions, only a single question is in fact presented here: whether the County violated the Fourth Amendment when it subjected respondent Noelle Way to an invasive visual body-cavity search, pursuant to a blanket county policy of conducting such searches on every person arrested on a misdemeanor charge of being under the influence of a controlled substance, regardless of the circumstances. Here, that blanket policy was applied to Way without a reasonable suspicion that she had hidden weapons or contraband in her body cavities and even though she was released on bail and never entered the general jail population. Based on the factual record before it, the court of appeals, in a unanimous opinion by Judge Pamela Rymer, agreed with the district court that the policy was unconstitutional because jail officials "failed to show any link between their blanket strip search policy and legitimate security concerns for detainees such as Way." Pet. App. 12a. The court of appeals' opinion was measured and narrow, deciding the validity only of the county policy before it, acknowledging that officers may conduct visual body-cavity searches when they have a reasonable suspicion that an arrestee is harboring weapons or contraband on her person and declining to rule out the possibility that other types of charges could support an across-the-board body-cavity search policy. *Id.* at 13a-14a & n.4.

The Ninth Circuit's conclusion here was consistent with that of the only other court of appeals to have decided the same question, *see Foote v. Spiegel,* 118 F.3d 1416 (10th Cir. 1997); *see also Cottrell v. Kaysville City,* 994 F.2d 730 (10th Cir. 1993), and was faithful to the principles established by this Court in *Bell v. Wolfish,* 441 U.S. 520 (1979). Its decision creates no conflict among the courts of appeals. Indeed, the circuits have been remarkably consistent in their approach to constitutional challenges to strip and visual body-cavity searches conducted on newly arrested pretrial detainees.

Even if the question whether a person arrested for being under the influence could be subjected to a visual body-cavity search without a reasonable suspicion that she was concealing contraband or weapons on her person merited review, this case would not be an appropriate vehicle for deciding it because Ventura County made virtually no record in the district court justifying its policy—a serious omission emphasized by both the district court and the court of appeals. *See* Pet. App. 12a, 20a-21a, 33a-34a. Petitioner attempts to make up for this failing by citing events it claims occurred after the district court's ruling, Pet. 5—none of which is in the record. There is no reason for the Court to consider the validity of an indiscriminate policy of performing visual body-cavity searches on all persons arrested for misdemeanor under-the-influence charges on a poorly developed record.

STATEMENT

1. The facts are undisputed. Respondent Noelle Way was working as a bartender at the Red Cove bar on September 6, 2000 in San Buenaventura, California when she encountered Robert Ortiz, a San Buenaventura police officer. Joint Statement of Uncontroverted Facts ("Joint Stmt."), Pet. App. 26a-27a.[1] Observing that Way had dilated pupils, rapid speech and pulse rate, and a nervous attitude, Officer Ortiz arrested her at approximately 2:10 a.m. on suspicion of being under the influence of cocaine or methamphetamine, Joint Stmt., Exh. B (ER 42), a misdemeanor violation of California Health & Safety Code § 11550(a). Pet. App. 26a-27a. Officer Ortiz conceded that, from the time he met Way until she was booked at the jail, he never had a basis for believing "that she had something hidden in her personal cavities." Deposition of

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[1] The facts to which the parties stipulated, *see* Joint Stmt. (Excerpts of Record ("ER") 31-36), are reprinted in the district court's July 22, 2002 order. Pet. App. 26a-31a.

Robert Ortiz ("Ortiz Depo.") (ER 158). After taking Way to a medical center to obtain a blood sample (which later came back negative for controlled substances, Pet App. 30a), Officer Ortiz brought her to the Ventura County Sheriff's Department Pretrial Detention Facility, Pet. App. 27a, "a 24-hour fresh-intake facility" that accepts all new arrestees for booking. Declaration of Bonnie Gatling ("Gatling Decl.") (ER 64).

Approximately an hour after her arrest, Way arrived at the pretrial detention facility and was booked between 3:10 a.m. and 3:36 a.m. Pet. App. 27a, 29a. After Way arrived in the Women's Booking section, Deputy Karen Hanson performed a pat-down search, which, as the parties stipulated, did not reveal anything that would lead the deputy to believe that Way was concealing drugs or weapons on her person or in her body cavities. *Id.* at 30a. The parties also stipulated that it was the policy of the Ventura County Sheriff's Department to conduct a same-sex, visual, unclothed body-cavity search, with no touching, on every person arrested for being under the influence of a controlled substance in violation of California Health & Safety Code § 11550. *Id.*; *see also* Joint Stmt., Exh. C (ER 44-53) (written policy). The ostensible purpose of the policy was to provide facility security and ensure the health and safety of arrested individuals. Gatling Decl. (ER 63). Visual body-cavity searches were conducted at the beginning of the booking process, *id.* (ER 64), with no waiting period to see if an inmate arrested on § 11550 charges is able to post bail. Pet. App. 30a. Pursuant to that policy, Deputy Hanson performed an unclothed visual body-cavity search of Way. *Id.* at 29a-30a. The parties agree that Deputy Hanson performed the search solely because Way was arrested for violating § 11550 and that Hanson "did not have any other information leading her to believe that the plaintiff was concealing contraband in her body cavities." *Id.*

The body-cavity searches in Women's Booking were conducted in a large, closed shower-dressing area with only the arrestee and a female deputy present. The deputy would instruct the arrestee to remove her clothing, one article at a time, and place it on the bench and to remove any bandages, prosthetic devices, wigs, dental plates, and feminine hygiene articles, such as tampons or feminine protection napkins. Declaration of Karen Hanson ("Hanson Decl.") (ER 69-70). After the arrestee removed all of her clothing, she would be visually searched. During this process, the deputy would direct the arrestee to bend forward, spread her buttocks, and cough in order to allow the deputy to inspect the arrestee's anal area. The deputy also would instruct the arrestee to spread her labia to allow a visual check of the vaginal area. As the arrestee removed each article of clothing, the deputy would search it and return it to the arrestee. *Id.* (ER 70). During Noelle Way's body-cavity search, Hanson observed that Way was using a tampon and required her to remove, tear, and discard the tampon in a nearby wastebasket. Pet. App. 29a. The search of Way did not yield any contraband, weapons, or drugs hidden on her person or in her body cavities. *Id.* at 30a.

After the search, the arrestee would get dressed and be placed into a booking cell to complete the booking process, make telephone calls, etc. Although Way was joined by a few other arrestees in her booking cell while she awaited payment of her bail, Deposition of Noelle Way (ER 76), she posted bail and was released several hours after her arrival at the pretrial detention facility, without ever entering the general jail population. Pet. App. 8a, 14a, 36a, 37a.[2] No charges were ever filed against her. *Id.* at 30a.

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[2] Female arrestees who were not released on bail were transported off-site to the Honor Farm in Ojai, California or, if they had a medical issue, were assigned to Special Housing. Gatling Decl. (ER 65); Hanson Decl. (ER 70-71).

2. Way brought an action under 42 U.S.C. § 1983 against Ventura County, Sheriff Robert Brooks, and Deputy Hanson in the Central District of California, alleging that they violated her rights under the Fourth and Fourteenth Amendments by subjecting her to a visual body-cavity search following her arrest.[3] After briefing on cross-motions for summary judgment, the district court held that the search was unreasonable and violated the Fourth Amendment. Pet. App. 32a-37a. The district court later denied qualified immunity to the individual defendants. District Court Order (Feb. 18, 2004) (ER 320-28).

The Ninth Circuit affirmed the district court's conclusion that the body-cavity search of Way violated the Fourth Amendment. Balancing "the need for the particular search against the invasion of personal rights that the search entails," Pet. App. 11a (quoting *Bell v. Wolfish*, 441 U.S. 520, 559 (1979)), the court of appeals held that the defendants "failed to show any link between their blanket strip search policy and legitimate security concerns for detainees such as Way." *Id.* at 12a. The court emphasized that the defendants "made only a conclusory submission that the purpose of the search protocol is 'to provide facility security and to ensure the inmate's health and safety,' and that inmates have 'sometimes' ingested drugs to evade detection." *Id.* In effect, the court found that the County asked it "to take security implications on faith." *Id.*

Furthermore, the court rejected the County's assertion that the charge of being under the influence of a drug necessarily poses a threat that the arrestee will conceal additional drugs in jail during the limited time between booking and bail, or booking and placement in the general population. Pet. App. 13a. In the absence of such a threat, "it was unreasonable to

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[3] Respondent also named Officer Ortiz as a defendant, but only in connection to claims concerning her arrest, which are not at issue here.

assume that Way harbored drugs in some cavity or other." *Id.* at 14a. As the court observed: "Way was under the control of the arresting officer from the time she was taken into custody at work until booking. The officer perceived no indication that she was carrying drugs or contraband." *Id.* The pat-down search at the jail likewise turned up nothing. *Id.* In these circumstances, the court concluded, "an arrest for being under the influence of a drug does not supply reasonable suspicion that drugs are concealed in a body cavity." *Id.* at 15a. The court of appeals held, however, that the individual defendants were entitled to qualified immunity. *Id.* at 15a-17a; *id.* at 17a-22a (Wardlaw, J., concurring).

REASONS FOR DENYING THE WRIT

I. THERE IS NO SPLIT IN THE CIRCUITS, AND THE COURT OF APPEALS' DECISION IS CONSISTENT WITH THIS COURT'S DECISIONS.

A. There Is No Circuit Split.

The intrusive and degrading nature of an unclothed, visual body-cavity search cannot be overstated. It has been appreciated by courts across the country, which have described strip searches involving the visual inspection of the anal and genital areas as "demeaning, dehumanizing, undignified, humiliating, terrifying, unpleasant, embarrassing, repulsive, signifying degradation and submission." *Mary Beth G. v. City of Chicago,* 723 F.2d 1263, 1272 (7th Cir. 1983) (citation omitted); *see also Roberts v. Rhode Island,* 239 F.3d 107, 110 (1st Cir. 2001) (characterizing visual body-cavity searches as "an 'extreme intrusion' on personal privacy and 'an offense to the dignity of the individual'") (citation omitted); Pet. App. 11a ("The scope of the intrusion here is indisputably a 'frightening and humiliating' invasion, even when conducted 'with all due courtesy.'") (citation omitted).

In *Bell v. Wolfish*, 441 U.S. 520 (1979), this Court considered a challenge to the federally operated New York City Metropolitan Correctional Center's policy of conducting visual body-cavity searches of all pretrial detainees after contact visits with persons from outside the institution. Although the Court noted that "this practice instinctively gives us the most pause," *id.* at 558, it held that, "under the circumstances," the contact-visit search policy did not violate the Fourth Amendment. *Id.* The Court explained that the test of reasonableness under the Fourth Amendment requires "[i]n each case . . . a balancing of the need for the particular search against the invasion of personal rights that the search entails. Courts must consider the scope of the particular intrusion, the manner in which it is conducted, the justification for initiating it, and the place in which it is conducted." *Id.* at 559. "Balancing the significant and legitimate security interests of the institution against the privacy interests of the inmates," the Court sustained the searches without requiring probable cause. *Id.* at 560.

After *Wolfish*, the disposition by the courts of appeals of challenges to blanket policies or practices authorizing strip searches or visual body-cavity searches for broad categories of new arrestees has been remarkably uniform.[4] There has been

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[4] Applying the balancing test under *Wolfish*, the courts of appeals have consistently held policies authorizing strip searches or visual body-cavity searches for broad categories of pretrial detainees, such as all arrestees admitted to jail or all persons arrested for felonies, without reasonable suspicion that the individual arrestee is concealing weapons or contraband, unreasonable under the Fourth Amendment. *See, e.g., Shain v. Ellison*, 273 F.3d 56 (2d Cir. 2001); *Wilson v. Jones*, 251 F.3d 1340 (11th Cir. 2001); *Roberts*, 239 F.3d 107; *Skurstenis v. Jones*, 236 F.3d 678 (11th Cir. 2000); *Kennedy v. Los Angeles Police Dep't*, 901 F.2d 702 (9th Cir. 1989); *Masters v. Crouch*, 872 F.2d 1248 (6th Cir. 1989); *Weber v. Dell*, 804 F.2d 796 (2d Cir. 1986); *Giles v. Ackerman*, 746 F.2d 614 (9th Cir. 1984), (continued...)

very little case law, however, addressing blanket policies authorizing such intrusive searches based solely on the fact of an arrest on a charge of being under the influence of an unlawful drug. There is no split in the circuits on the question presented. To the best of counsel's knowledge, only one other court of appeals, the Tenth Circuit, has addressed whether an arrest for being under the influence of a controlled substance—without something more—provides a sufficient basis for conducting a strip search or visual body-cavity search, and that court held, in agreement with the Ninth Circuit, that it does not.

In *Foote v. Spiegel,* 118 F.3d 1416 (10th Cir. 1997), Kristin Foote was arrested on suspicion of driving while under the influence of marijuana. *Id.* at 1420. As was true here, there was no particular reason to suspect Foote of hiding drugs on her person; rather, she was strip searched at the county jail pursuant to a jail practice of strip searching all persons arrested on drug-related charges. *Id.* at 1421, 1425. Also like respondent, Foote was released on bond and was never placed in the general jail population. *Id.* Relying on its earlier decision in *Cottrell v. Kaysville City,* 994 F.2d 730, 734 (10th Cir. 1993), which held unconstitutional a county jail's policy of

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[4](...continued)
overruled in part on other grounds, Hodgers-Durgin v. de la Vina, 199 F.3d 1037 (9th Cir. 1999); *Stewart v. Lubbock County,* 767 F.2d 153 (5th Cir. 1985); *Mary Beth G.,* 723 F.2d 1263; *Logan v. Shealy,* 660 F.2d 1007 (4th Cir. 1981). The Ninth Circuit and others have explained that reasonable suspicion may be based on such factors as "the nature of the offense, the arrestee's appearance and conduct, and the prior arrest record." *Giles,* 746 F.2d at 617; *accord Kraushaar v. Flanigan,* 45 F.3d 1040, 1045 (7th Cir. 1995); *Kelly v. Foti,* 77 F.3d 819, 821 (5th Cir. 1996); *see also Weber,* 804 F.2d at 802 (considerations giving rise to reasonable suspicion include "the crime charged, the particular characteristics of the arrestee, and/or the circumstances of the arrest").

conducting strip searches of all persons arrested on drug-related charges, the Tenth Circuit explained that "[p]robable cause to believe a person was driving while under the influence of drugs does not establish reasonable suspicion that such person has drugs that can only be found by a strip search." *Foote,* 118 F.3d at 1423. The court found that "[t]he belief that Foote had drugs hidden in a body cavity because she was suspected of driving while under the influence of drugs, when no drugs had been found in her vehicle, on her passenger, or in a pat-down search, was unreasonable." *Id.* at 1426. The little other case law addressing this and similar issues is in accord. *See Swain v. Spinney,* 117 F.3d 1, 9 (1st Cir. 1997) (arrest for possession of small quantity of marijuana insufficient to render a strip and visual body-cavity search reasonable); *Dodge v. County of Orange,* 209 F.R.D. 65, 76-77 (S.D.N.Y. 2002) (ruling at the preliminary injunction stage that the appearance of being under the influence of alcohol or drugs alone is insufficient to justify a strip search); *cf. Logan,* 660 F.2d at 1013 (strip search of person arrested for driving while intoxicated "bore no . . . discernible relationship to security needs at the Detention Center"); *accord Stewart,* 767 F.2d at 155-57.

Petitioner implies, however, that the Ninth Circuit's approach to analyzing the validity of Ventura County's body-cavity search policy differs from that of other circuits, and it declares that "[t]here has been a strong predisposition in the circuits over the last two decades to equate the probable cause to arrest for charges relating to drugs, violence, or weapons with the lower informational level of reasonable suspicion" sufficient to allow a visual body-cavity search. Pet. 9. That proclamation distorts the state of the law. As discussed above, the circuits overwhelmingly have agreed that sweeping county jail policies authorizing strip or body-cavity searches for broad categories of fresh arrestees, in the absence of individualized reasonable suspicion that an arrestee is secreting contraband or weapons on her person, are unreasonable under the Fourth

Amendment. Petitioner does not cite a single case that is on point, in which a court of appeals has sustained a blanket policy allowing strip searches of all persons arrested for being under the influence of a drug (or even of all persons arrested for some other type of drug offense). The dearth of cases addressing this issue is reason alone for this Court to deny certiorari.

The smattering of circuit cases cited by the petitioner at Pet. 7-10 are inapposite and, in any event, do not follow an approach any different from that of the Ninth Circuit. In *Watt v. City of Richardson Police Department,* 849 F.2d 195 (5th Cir. 1988), *cited in* Pet. 9, the Fifth Circuit never addressed what types of charges might alone justify a strip search because there the court held unconstitutional a strip search of a woman who had been convicted more than 10 years earlier of a minor drug offense and was now arrested for failure to license her dog. *Watt,* 849 F.2d at 196. The court noted in dicta that the plaintiff did not challenge the propriety of strip searches "conducted prior to incarceration on charges of narcotics, shoplifting or weapons violations" and that such a challenge would be "fruitless," *id.* at 197, but the court never had an opportunity to address what types of "narcotics" charges might justify such a search because the question was not presented. Even as dicta, the above statement in *Watt* does not apply here because Noelle Way was never incarcerated.

The Seventh Circuit's decision in *Kraushaar v. Flanigan,* 45 F.3d 1040 (7th Cir. 1995), *cited in* Pet. 10, is equally inapplicable. Petitioner quotes language from the opinion about a pat-down search not necessarily revealing small items such as "several hits of LSD on postage stamps, a small rock of crack cocaine, or a razor blade," 45 F.3d at 1046, leaving the impression that the Seventh Circuit held that routine strip searches are acceptable to compensate for deficiencies in pat-down searches. But the court of appeals in *Kraushaar* upheld a strip search only because the plaintiff's arrest for driving under the influence was coupled with furtive hand movements

suggesting that the plaintiff was attempting to hide something in his pants, thereby giving the arresting officer a reasonable suspicion that the arrestee had hidden contraband in his pants and a justification for conducting a more intrusive search. *Id.* Ninth Circuit law, like that of all other circuits to have addressed the issue, is equally clear that a strip search may be conducted if an officer has a reasonable suspicion that a particular arrestee is carrying or concealing contraband on her person. *See, e.g., Giles,* 746 F.2d at 615, 617-18. Here, however, the parties have stipulated that the arresting and jail officers *lacked* reasonable suspicion to believe that Way had hidden contraband on her person or in her body cavities.

The Sixth Circuit's decision in *Dufrin v. Spreen,* 712 F.2d 1084 (6th Cir. 1983), *cited in* Pet. 9-10, is also distinguishable. There, the court upheld a strip search of a woman arrested for a felony violent assault where, given jail conditions, "she would ultimately come into contact with the general jail population." 712 F.2d at 1087. Leaving aside the question whether felony violent offense charges present potentially more serious security concerns than other, less serious charges (such as misdemeanor under-the-influence charges), as *Dufrin* and other decisions have suggested, these courts sustained the strip searches because of the combination of the danger indicated by a charge of committing a violent crime and the inmate's expected entry into the general jail population. *See id.* at 1087, 1089; *see also Hicks v. Moore,* 422 F.3d 1246, 1248, 1251-52 (11th Cir. 2005) (holding that plaintiff's strip search could not be justified based only upon her impending placement in the general jail population, but was reasonable because her arrest for family violence battery evoked reasonable suspicion that she might be concealing weapons or contraband), *cited in* Pet. 7-9; *Thompson v. City of Los Angeles,* 885 F.2d 1439, 1447 (9th Cir. 1989) (upholding strip search of arrestee upon entering jail population because his offense of grand theft auto was sufficiently associated with violence to justify a visual strip

search), *cited in* Pet. 10; *cf. Block v. Rutherford*, 468 U.S. 576, 583 (1984) ("The very fact of nonrelease pending trial . . . is a significant factor bearing on the security measures that are imperative to proper administration of a detention facility.").

Here, by contrast, as both the court of appeals and district court pointed out, respondent Way posted bail not long after her arrest, and there was no evidence that she was ever housed with (or expected to be housed with) the general jail population. Pet. App. 8a, 14a, 36a, 37a. Moreover, the Ninth Circuit's holding here was quite narrow, expressly reserving judgment on whether other types of drug charges alone might give rise to reasonable suspicion to conduct a visual body-cavity search. *Id.* at 13a-14a & n.4.

Petitioner emphasizes the Eleventh Circuit's decision in *Hicks* as evidence of a circuit conflict, but as noted above, *Hicks* is inapposite because the court's decision to uphold the strip search was based on the fact that a detainee who was to be placed in the jail's general population had been arrested for a crime of violence. *Hicks*, 422 F.3d at 1251-52. Petitioner tries to transform *Hicks* into a more significant ruling by pointing out that the authors of the *Hicks* opinion "personally question[ed]" whether it would violate the Fourth Amendment for a county jail to strip search "every detainee who was to be placed in the general population of the Jail." *Id.* at 1251 & n.5; *see* Pet. 8. The *Hicks* panel acknowledged, however, that the law of the Eleventh Circuit is that reasonable suspicion is required, *Hicks*, 422 F.3d at 1251 n.5; *e.g.*, *Wilson*, 251 F.3d at 1343, and it reaffirmed that, under Eleventh Circuit law, the strip search could not be justified on the single ground that the plaintiff was about to enter the jail's general population. *Hicks*, 422 F.3d at 1248, 1251 n.5. Petitioner's grasping at a disagreement in personal views of judges in another circuit—on a question not even presented by this petition—only reinforces just how unworthy this particular case is of further review. Moreover, because Way posted bail and never entered the

general jail population, the personal disagreement within the Eleventh Circuit is irrelevant to this case.[5]

B. The Court Of Appeals' Decision Is Consistent With *Bell v. Wolfish.*

Petitioner also argues that the court of appeals' decision conflicts with this Court's decision in *Bell v. Wolfish*, upholding visual strip searches of all inmates who had contact visits with visitors from outside the institution. Pet. 11-13. The County claims that "being under the influence of a mind-altering substance says as much, if not a great deal more than a contact visit, about the lengths to which an arrestee will go to hide paraphernalia and drugs." *Id.* at 11. Tellingly, petitioner cites no court decision that has agreed with its position. In any event, the issue is not worthy of this Court's review.

First, the court of appeals correctly stated the analysis required by *Wolfish*: that the court must "balanc[e] 'the need for the particular search against the invasion of personal rights that the search entails.'" That "requires us to weigh 'the scope of the particular intrusion, the manner in which it is conducted, the justification for initiating it, and the place in which it is conducted.'" Pet. App. 11a (quoting *Wolfish*, 441 U.S. at 559). As this Court's rules reflect, a petition for certiorari is rarely granted when the asserted error consists of "the misapplication of a properly stated rule of law." Sup. Ct. R. 10.

Second, in finding no justification for the County's visual body-cavity search policy, the court of appeals relied on the

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[5] Although the question is not presented here, the circuits generally have agreed that entry into or intermingling with the general jail population, without more, is insufficient grounds to justify a strip or visual body-cavity search. *See, e.g., Roberts*, 239 F.3d at 112-13; *Kelly*, 77 F.3d at 822; *Masters*, 872 F.2d at 1254; *Weber*, 804 F.2d at 801-02; *Giles*, 746 F.2d at 618-19; *Hill v. Bogans*, 735 F.2d 391, 394 (10th Cir. 1984).

factual record before it. In *Wolfish*, this Court emphasized that the record reflected that visual cavity searches after contact visits were necessary not only to discover but to deter the smuggling of weapons, drugs, and other contraband into the institution, 441 U.S. at 558, and that such smuggling efforts were documented not only in the record, but in other court decisions as well. *Id.* at 559. By contrast, the premise of Ventura County's policy—that people arrested for being under the influence of an illegal drug are likely to conceal drugs in their body orifices—was not documented in this case, or in any others, for that matter. The court of appeals was left to balance the "'frightening and humiliating' invasion" of personal rights that accompanied visual body-cavity searches, Pet. App. 11a, against the jail's rote invocation of security concerns, unsupported by "any link between [the County's] blanket strip search policy and legitimate security concerns for detainees such as Way." *Id.* at 12a; *see also id.* at 17a.

Petitioner protests that the Ninth Circuit demanded a "track record of disaster" to justify the County's blanket policy. Pet. i, 6, 15, 19. That is not correct. The court of appeals simply declined "to take security implications on faith." Pet. App. 12a. As the court explained, the defendants "made only a conclusory submission" in the district court "that the purpose of the search protocol is 'to provide facility security and to ensure the inmate's health and safety,' and that inmates have 'sometimes' ingested drugs to evade detection." *Id.*; *see also id.* at 21a (Wardlaw, J., concurring) ("no documentation of security concerns in this case"). Likewise, the district court found wanting defendants' conclusory submission that the sweeping body-cavity searches were necessary to promote security or to prevent inmates from ingesting drugs or their containers (*e.g.*, balloons), emphasizing that defendants provided "no evidence regarding whether these inmates were charged with violating Health and Safety Code Section 11550" or whether visual, unclothed body-cavity searches of pretrial detainees charged

with violating § 11550 "have resulted in the discovery of concealed drugs or contraband or prevented injury to the detainees." Pet. App. 34a; *see also id.* at 13a.[6]

Petitioner's reliance on *Bell v. Wolfish* ultimately rests on various unsupported assertions by the County about why it is reasonable to believe that individuals who are under the influence of an illegal drug routinely hide drugs in their body cavities. *See, e.g.*, Pet. 12 ("Upon realizing that an encounter with the law is imminent, only a fool would fail to quickly secrete the narcotics or paraphernalia in the most readily accessible and least detectible locations."); *id.* ("While hiding objects in body cavities is not sane practice, fear of brutal retribution is the mother of invention."). These various assertions are unfounded—which is why petitioner identifies no court decision that has accepted them—and are offered without citation to the record or to any other authority. As the court of appeals pointed out, "Way was under the control of the arresting officer from the time she was taken into custody at work until booking." Pet. App. 14a. A pat-down search upon

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[6] Petitioner's fourth question presented asks whether this Court's holding in *Schmerber v. California*, 384 U.S. 757 (1966), that probable cause to arrest for intoxication permits the state to force an arrestee to have blood drawn, implies that jail personnel processing a drug-intoxicated suspect should be permitted to perform a visual body-cavity search. Pet. i. This question was not presented to the lower courts and should not be considered by this Court. The purpose of the blood test in *Schmerber* was to search for evidence of a crime, whereas here, the County argued to the district court and the Ninth Circuit that the body-cavity search was necessary for security purposes and the protection of arrestees—*not* for investigative purposes. *See, e.g.*, Gatling Decl. (ER 63) ("The entire purpose of the procedure is to provide facility security and to ensure the inmate's health and safety, not to search for evidence of crime."); *accord* Defendants' Motion for Summary Judgment (ER 107-08); Appellants' Opening Brief at 42 n.2 (9th Cir.).

her arrival at Women's Booking at the jail likewise turned up nothing. *Id.* Way was subjected to the body-cavity search almost immediately thereafter, before she was exposed to other inmates. The only way arrestees like respondent could be concealing drugs in body cavities would be if they hid drugs there before ever having their encounters with law enforcement. But to assume that persons under the influence of drugs, who have no expectation of having such an encounter, conceal drugs in their body orifices is patently unreasonable. The Tenth Circuit put it well:

> [B]ecause Foote had no opportunity to hide anything beneath her clothing after Howe had stopped her vehicle and a thorough pat-down search at the jail had revealed no drugs, the strip search could be justified only if it were reasonable to believe persons driving while under the influence of marijuana, who have no particular reason to expect they will be searched, routinely carry a personal stash in a body cavity. That belief is unreasonable.

Foote, 118 F.3d at 1426.

Because of the unexpected nature of an arrest for being under the influence of a drug, the deterrence rationale articulated in *Wolfish*, 441 U.S. at 559, is inapposite, as the court of appeals found. *See* Pet. App. 12a ("Nor did [the County] adduce evidence of any deterrent effect on persons such as Way who are spontaneously arrested and detained temporarily at the facility for being under the influence."). Several courts of appeals have made the same observation about deterrence in the context of strip searches of new arrestees. *See, e.g., Shain*, 273 F.3d at 64 ("Unlike persons already in jail who receive contact visits, arrestees do not ordinarily have notice that they are about to be arrested and thus an opportunity to hide something."); *Roberts*, 239 F.3d at 111 ("[T]he deterrent rationale for the *Bell* search is simply less

relevant given the essentially unplanned nature of an arrest and subsequent incarceration."); *Jones v. Edwards,* 770 F.2d 739, 741 (8th Cir. 1985) (that officers were with the arrestee every moment after they read him the warrant "eliminat[ed] any chance that he might have secreted a weapon on his person"). As the Ninth Circuit elaborated in a previous decision: "Visitors to the detention facility in *Bell* could plan their visits and organize their smuggling activities. In contrast, arrest and confinement in the Bonneville County Jail are unplanned events, so the policy could not possibly deter arrestees from carrying contraband." *Giles,* 746 F.2d at 617.

Evidently realizing that it failed to make any record justifying its blanket policy, petitioner cites events it claims occurred *after* the district court's ruling, Pet. 5—none of which is in the record. The County's persistence in citing difficulties it has purportedly encountered *after* declaring a moratorium on its search policy (and it is unknown whether any of the cited incidents has anything to do with arrests for being under the influence) is remarkable given that it attempted the same tactic without success in the Ninth Circuit. The court of appeals pointed out that the County's counsel had claimed during oral argument that the jail "had experienced difficulties" since the district court's ruling, but that "the record contains no evidence of whatever they might be." Pet. App. 12a (n.3).

Thus, given the lack of a developed record justifying the County's body-cavity search policy, this Court should deny the writ of certiorari even if the question presented here merited review because this case is a poor vehicle for deciding it.

II. THE CONSTITUTIONALITY OF CALIFORNIA'S STRIP-SEARCH STATUTE WAS NOT CHALLENGED OR ADDRESSED BELOW.

Petitioner attempts to make the Ninth Circuit's decision appear more consequential than it is by implying that the court of appeals implicitly struck down a California statute, Cal.

Penal Code § 4030, governing strip and body-cavity searches. Pet. i, 17-19. That statute exempts offenses "involving weapons, controlled substances or violence" from its general prohibition on conducting strip searches or visual body-cavity searches on persons arrested for misdemeanor or infraction offenses "prior to placement in the general jail population." Cal. Penal Code § 4030(f). Although the Ventura County policy of subjecting all persons arrested for being under the influence of a controlled substance to visual body-cavity searches may not violate the state statute, neither is it compelled by the statute. The California statute does not require the County to conduct any such search, and therefore says nothing about the legitimacy of the County's across-the-board suspicionless visual body-cavity search policy. The statute likewise does not address visual body-cavity searches such as this one, which involved an arrestee who was *not* about to be placed in the general jail population. In any event, Way argued that the County had improperly construed the California statute, but she did not challenge, and the lower courts did not address, its constitutionality. Thus, its validity is not before this Court.

III. THE POLICY ARGUMENTS PRESENTED IN THE PETITION LIKEWISE DO NOT MERIT FURTHER REVIEW.

Finally, petitioner makes various policy arguments to encourage this Court to grant certiorari, none of which warrants further review. Petitioner's main complaint is that the Ninth Circuit did not address questions not before it, such as whether it would be permissible under the Fourth Amendment to conduct strip searches on new arrestees if the drug charges had been different. Pet. 6, 14-15, 19. Far from being a deficiency, the measured and narrow nature of the court of appeals' decision commends it. The court left for another day such questions as whether a charge for drug possession would be sufficient or whether possession for sale would be required, *id.*

at 14—questions not presented by this case. *See United States Nat'l Bank of Oregon v. Indep. Ins. Agents of America, Inc.*, 508 U.S. 439, 446 (1993) (federal courts lack power to render advisory opinions); *Ashwander v. Tennessee Valley Auth.*, 297 U.S. 288, 345-48 (1936) (Brandeis, J., concurring). Essentially, petitioner protests that the Ninth Circuit's reservation of judgment on whether an appropriately tailored prophylactic body-cavity search policy might survive Fourth Amendment scrutiny, while otherwise requiring individualized suspicion that an arrestee is concealing contraband or weapons on her person, does not provide the County with sufficient guidance and leaves it exposed to liability. Pet. 6, 14-16.[7]

Short of issuing an advisory opinion, however, neither the Ninth Circuit nor any other court can address situations not before it. Moreover, as this Court recognized in *Wolfish*: "The test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application. In each case it requires a balancing of the need for the particular search against the invasion of personal rights that the search entails." 441 U.S. at 559; *see also Sokolow*, 490 U.S. at 7 ("The concept

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[7] Petitioner characterizes the court of appeals' opinion as approaching imposing a requirement of "the demonstration of individualized probable cause" to believe that a new arrestee is concealing drugs or drug paraphernalia, Pet. 6, but that is an incorrect reading of the opinion. In keeping with the view of other circuits to have addressed the matter, *see supra* n.4, the court of appeals requires a showing of reasonable suspicion—*not* probable cause—to conduct a strip search and has suggested that, in appropriate cases, the charge itself may give rise to that reasonable suspicion. Pet. App. 13a (citing *Thompson*, 885 F.2d at 1447). As this Court has often recognized, the Fourth Amendment's "reasonable suspicion" requirement of "some minimal level of objective justification" is "obviously less demanding" than what is required for probable cause. *See United States v. Sokolow*, 490 U.S. 1, 7 (1989); *accord Illinois v. Wardlow*, 528 U.S. 119, 123 (2000).

of reasonable suspicion . . . is not 'readily, or even usefully reduced to a neat set of legal rules.'") (citation omitted); *accord Ornelas v. United States,* 517 U.S. 690, 696 (1996) (reasonable suspicion and probable cause standards "are not 'finely-tuned standards'" but are instead "fluid concepts that take their substantive content from the particular contexts in which the standards are being assessed").

Petitioner says it wants to limit its potential litigation liability, but this is not a case in which a jail official authorized a visual body-cavity search based upon a reasonable suspicion that the arrestee was hiding contraband on her person, and a court later second-guessed that judgment. By adopting a policy authorizing the indiscriminate conduct of intrusive, humiliating, and degrading visual body-cavity searches based only on the fact of a misdemeanor charge of being under the influence of a drug, Ventura County led with its chin, given the strong consensus of circuits across the county that blanket strip search policies governing new arrestees rarely (if ever) pass Fourth Amendment muster. A more nuanced approach authorizing such searches only when the arresting officer or jail personnel has a reasonable suspicion to believe that the arrestee is concealing drugs or weapons on her person---or at least limiting such searches to a narrower category of offenses that the County can actually link to genuine security concerns—would not only safeguard Fourth Amendment rights, but would insulate the County from liability for all but the most egregious abuses, given that the County cannot be held liable on a respondeat superior theory. *Monell v. Dep't of Social Servs. of New York,* 436 U.S. 658, 691 (1978); *e.g., Abshire v. Walls,* 830 F.2d 1277, 1280, 1282 (4th Cir. 1987) (affirming grant of summary judgment in favor of County, despite jury verdict that plaintiff had been subjected to an unreasonable strip search, because the County's strip search policy required specific factors to be present that established a reasonable belief that the search would uncover a weapon or a controlled

substance, satisfying constitutional standards); *Beasley v. City of Sugar Land,* 410 F. Supp. 2d 524, 528-29 (S.D. Tex. 2006) (granting city's motion for summary judgment, despite fact that a strip search occurring under the alleged circumstances would violate the Fourth Amendment, because the city's policy constitutionally authorized strip searches only when the officer had a reasonable suspicion that an individual posed a threat to facility security). Way is aware of no case law—and petitioner cites none—supporting petitioner's farfetched claim that the County can be held liable for *failing* to conduct a visual body-cavity search if an arrestee, without the County's knowledge, has concealed contraband in a body cavity and then harms herself with it. Pet. 16-17.

CONCLUSION

For the foregoing reasons, the petition should be denied.

Respectfully submitted,

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